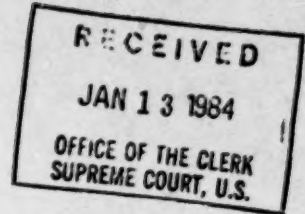


**ORIGINAL**



No. **83-6092**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TERESA ELEAZAR, PETITIONER

v

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Christine Witcover Dean  
Counsel for Petitioner  
Post Office Box 667  
Raleigh, North Carolina 27602  
(919) 828-9800

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Questions Presented\*

- I. WAS PETITIONER DENIED DUE PROCESS AND ADEQUATE REPRESENTATION OF COUNSEL BY THE RULE OF THE FOURTH CIRCUIT REQUIRING A CONSOLIDATED BRIEF AND ARGUMENT?
- II. DID THE FOURTH CIRCUIT'S APPROVAL OF THE ADMISSION OF CO-CONSPIRATORS STATEMENTS WITHOUT DEFENDANT BEING OTHERWISE CONNECTED TO THE CONSPIRACY CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS?
- ✓ III. WAS THE EVIDENCE FROM A FEDERAL WIRETAP BASED ON AN INVALID STATE WIRETAP AN ILLEGAL SEIZURE?
- IV. DID THE FOURTH CIRCUIT'S DECISION UPHOLDING PETITIONER'S CONVICTION CONFLICT WITH DECISIONS OF OTHER CIRCUITS?
- V. WAS THE PETITIONER DENIED A FAIR AND IMPARTIAL HEARING?
  - A. DID THE TRIAL JUDGE PRESIDING OVER A POST-TRIAL HEARING AT WHICH HE TESTIFIED DENY PETITIONER AN IMPARTIAL DECISION ON THE JURY TAMPERING ISSUE?

B. WAS PETITIONER DENIED HER RIGHT TO MAKE INQUIRY  
INTO THE EXTENT OF JURY CONTAMINATION BY HAVING  
ALL JURORS TESTIFY?

VI. WAS PETITIONER DENIED TRIAL BY A FAIR AND IMPARTIAL  
JURY?

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\*The following parties were also listed as defendants  
in the proceedings below: Ronald Doyle Hines, Gary J. Peed,  
James Maurice Jackson, James C. Coddington, Jeffrey Craig  
Bumgardner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
FOR THE FOURTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate  
Justices of the Supreme Court of the United States:  
TERESA ELEAZAR, Petitioner herein, prays that a writ of  
certiorari issue to review the judgment of the United  
States Court of Appeals for the Fourth Circuit entered  
on September 9, 1983.

OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals  
(App. infra, p. 1) is reported at 717 F. 2d 1481 (1983).  
The decision of the District Court below (App. infra,  
p. 28) was not reported.

### JURISDICTION

The Judgment of the Fourth Circuit Court of Appeals was entered on September 9, 1983. The petition for rehearing was denied November 14, 1983. Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, §1254(1).

### CONSTITUTIONAL PROVISIONS & STATUTORY AUTHORITY

1. The Fourth Amendment, United States Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

2. The Fifth Amendment, United States Constitution, which provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

3. The Sixth Amendment, United States Constitution,  
which provides:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

4. Title 21, United States Code, §846, which provides:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

5. Federal Rules of Evidence, Rule 104(a) and (b),  
which provides:

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of

subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

6. Federal Rules of Evidence, Rule 605, which provides:

Competency of Judge as Witness. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

7. Federal Rules of Evidence, Rule 606(b) which provides:

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

8. Federal Rules of Criminal Procedure, Rule 30, which provides:

Instructions. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

9. Federal Rules of Criminal Procedure, Rule 43(a), which provides:

Presence of the Defendant. Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

10. Local Rules, Fourth Circuit Court of Appeals, Rule 19, which provides:

Consolidated Cases and Briefs. Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side,

including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the Clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the Clerk shall designate lead counsel. The individual so designated shall be responsible for the coordination, preparation and filing of the briefs and appendix.

#### STATEMENT OF CASE

The facts necessary to place in their setting the questions now raised are briefly as follows:

A. Procedural history.

Petitioner was tried on a superseding criminal Indictment in the Eastern District of North Carolina along with nine others. (App. infra, p. 34). She was charged with conspiring to possess with intent to distribute cocaine, and one count of unlawful use of a communication facility (telephone) in furtherance of that conspiracy. The telephone conversation which was the basis of the substantive count was the same as the only overt act of the conspiracy count in which she was listed. Numerous pretrial motions were filed, including one to suppress the wiretap, which was denied. Requests for a preliminary determination that the government

could establish a conspiracy and each defendant's link to it by non-hearsay evidence was postponed until trial. The trial court never made such a determination as to petitioner. After a jury trial, petitioner was acquitted of the communication charge but was convicted on the conspiracy charge. Prior to sentencing, a hearing was held concerning the effect upon the jury of having been photographed by a person whose identity was not known to them, but who was identified at the hearing by the judge as having been an F.B.I. agent. The juror who had reported the incident to the trial judge was examined by the trial judge, who also testified to his handling of the incident, which had occurred without notification to any of the defendants. Petitioner received five years, to serve six months active, the remainder suspended, and she was placed on probation for five years. (App. infra, p. 33). She appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit consolidated the cases of all defendants for briefing and argument pursuant to their Local Rule 19. The Fourth Circuit upheld petitioner's conviction, (App., infra, p. 1), denied her motion for rehearing, and denied her motion for stay of the mandate. Petitioner continues free on bond during the pendency of her appeal by order of trial judge.

B. Evidence.

An investigation by Florida authorities prompted them to obtain a wiretap in another county, outside their

jurisdiction under Florida law. In the course of that wiretap they received information that James Jacques Provost was moving to Apex, North Carolina to conduct cocaine transactions. DEA agents used this information to obtain federal wiretap authorization. The interception of calls to and from Provost's house was the basis for the Indictment. By the time the Indictment was returned, Provost had died.

One of the named defendants, James "Bubba" Jackson, is the brother of petitioner Eleazar. During the period of the federal wiretap, he called her house several times. In general, his conversations were with her then boyfriend, co-defendant Jeffrey Craig Bumgardner. Petitioner Eleazar generally answered the telephone and discussed family matters, then gave the telephone to Bumgardner at her brother's request, and absented herself. In the one conversation in which the jury acquitted her of having a conversation to facilitate the conspiracy, she told her brother that another co-defendant "got all that stuff", the jury agreeing with Eleazar that this conversation had an innocent connotation. Bumgardner in another conversation told her brother that "Teresa picked it up and took it to Ronnie." There was also evidence that Eleazar had mailed her brother a money order in the name of James Jacques Provost, Raleigh, North Carolina, and the taped conversation showed she was unfamiliar with both the name and location. However, she was aware her brother had

jumped bond and, therefore, thought she understood the reason for putting a different name on the money order and being an anonymous sender.

#### REASONS TO GRANT THE WRIT

##### I. PETITIONER WAS DENIED DUE PROCESS OF LAW AND ADEQUATE REPRESENTATION OF COUNSEL BY THE RULE OF THE FOURTH CIRCUIT REQUIRING A CONSOLIDATED BRIEF AND ARGUMENT.

After the six defendants who were convicted filed their notices of appeal, the United States Court of Appeals for the Fourth Circuit entered an order consolidating the cases for briefing and argument. Petitioner's attorney, who was appointed later by the Fourth Circuit, was notified of this by letter. (App., infra, p. 27). This consolidation was pursuant to the Local Rules of the United States Court of Appeals for the Fourth Circuit, Rule 19. While in many cases, such consolidation may not be harmful, in the instant case it materially prejudiced petitioner's ability to present her case on appeal.

Petitioner was forced to rely upon the representation of co-defendants' counsel to present several issues on her behalf, both in the brief and at oral argument. She was not allowed to fully present issues solely as pertained to her

special situation. This deprived petitioner of the right to have her attorney present her case to the court.

Because of the time limits, the various issues were divided among counsel for the various defendants at a meeting shortly after petitioner's counsel became involved in the case. All material was sent to the lead counsel for assembling in a consolidated brief in time to have the Brief timely filed. Because of the limits on the length of the Brief, some issues were discarded. Petitioner would have, in an individual Brief, raised a severance issue based on the prejudice to her defense by the exclusion of the information that her brother was a bond jumper, which evidence provided innocent motive for some of her actions which the government argued showed her involvement in the conspiracy. That evidence was excluded upon her brother's motion as being prejudicial to him. The severance motion was made by petitioner at trial on the conflict of defenses ground as well as the presence of multiple conspiracies, most of which had no relation to her at all. The Brief was weighted for lead counsel's client, Petitioner's brother, in terms of amount of space spent on an argument pertaining solely to him.

Moreover, at oral argument the limitation of thirty minutes to a side resulted in petitioner's attorney not being able to argue. The only issues argued were the wiretap issue, the jury issue, and an Interstate Detainer Act issue which pertained solely to lead counsel's client.

Petitioner was prejudiced because she was in a special situation which none of the other defendants shared. She was the only defendant who testified in her own behalf at trial. She was the only defendant acquitted of any charge. The evidence against her was weak, and she was the least culpable, if at all. Some of the defendants had interests directly adverse to her, including her brother; for her to have to rely on their presentation of issues vitiated her right to independent counsel. She was denied due process by the curtailment of her opportunity to present her issues fully. Only this Court can rectify that denial.

Moreover, a check of the local rules of the other federal courts of appeals reveals that only the Fourth Circuit requires consolidation of briefs. While some of the other circuits provide for consolidation of oral argument, that appears to be on a case-by-case basis. Further, all the other courts except the District of Columbia circuit limit the attorneys who argue to so many per party, not per side. While there may be an interest in avoiding duplication, it does not overcome the petitioner's right to fully present her case to the court, structuring the issues in light of her own situation. Being denied both the right to present her case in written form as well as orally, meant that appellate review of petitioner's case was not meaningful, the court instead ruling on the totality of the case and lumping defendants together in categories.

Therefore, petitioner contends that this denial of her appellate rights merits review of her case by this Court, and a ruling made on the Fourth Circuit rule as applied in this case.

II. THE FOURTH CIRCUIT'S APPROVAL OF THE ADMISSION OF CO-CONSPIRATORS' STATEMENTS WITHOUT BEING OTHERWISE CONNECTED TO THE CONSPIRACY IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Defendants had requested that the trial court make a determination that each defendant had been connected to the charged conspiracy by non-hearsay evidence before admitting co-conspirators' statements under Federal Rules of Evidence, Rule 104(a) and (b). The Magistrate decided that such decision should be made at trial. The trial judge never made a decision as to petitioner, as required by Glasser v. United States, 315 U.S. 60, 74 (1942), and United States v. Jones, 542 F.2d 186, 207 (4th Cir., 1976). The trial court instead noted that petitioner still had to be connected to the conspiracy, at the time he held three of the defendants to have been so connected.

However, co-conspirator statements were allowed to be introduced which allegedly inculpated petitioner. The Fourth Circuit relied on such statements in stating the case against

her. 717 F.2d at 1490-91 (App., infra, p. 24). The only evidence against her which was not hearsay co-conspirator statements was her testimony that she mailed a money order to her brother which he apparently used or intended to use for drugs.

Moreover, petitioner contends that there was no proof she was a member of the charged conspiracy--the ring headed by Provost. Even assuming, arguendo, that she was conspiring with her brother and boyfriend, the government's evidence through its chief witness was that "(t)hey (Bubba's people) were not part of Mr. Provost's organization, per se." The evidence showed that the government's witnesses had engaged in endeavors of their own, without Provost's knowledge and indicated that Bubba was doing the same. Thus, a "wheel" conspiracy was shown. The Fourth Circuit erred in determining there was only one conspiracy, or at most "only two." 717 F.2d at 1489-90. (App., infra, pp. 21-22). The legal premise for that conclusion was also erroneous. The Court said that had other retailers been charged, then perhaps multiple conspiracies repugnant to U. S. v. Coward, 630 F.2d 229, cert. denied, 456 U.S. 946 (1982) would have been proven. 717 F.2d at 1489. (App., infra, p. 22). Clearly, all conspirators do not need to be charged for a conspiracy to exist. While the evidence tended to show Bubba was setting up his own organization, it did not show he contemplated it being part of Provost's. Provost was at that time out of cocaine and unable to distribute to anyone.

Therefore, by the Fourth Circuit ruling such hearsay statements to be admissible against petitioner, petitioner was denied due process and such decision is contrary to Glasser v. United States, supra, and the Federal Rules of Evidence promulgated by this Court.

III. THE EVIDENCE FROM A FEDERAL WIRETAP BASED ON AN  
INVALID STATE WIRETAP WAS AN ILLEGAL SEIZURE.

Wong Sun v. United States, 317 U.S. 471 (1963) held that the federal government could not use evidence which had a tainted source. Here the state officials provided a reverse "silver-platter", by giving information to the federal government which their courts had ruled illegal.

Wilson v. Florida, 403 So. 2d 982 (Fla. 1980) held that it was illegal for police officers to conduct electronic monitors or surveillance outside their jurisdiction. Once outside their jurisdiction they no longer were law enforcement personnel under Florida statutes. In the instant case, the investigation was instigated by detectives of the Jacksonville Beach Police Department. The surveillance and interceptions which provided the basis for the federal wiretap was conducted in St. Johns and Duval Counties outside their jurisdiction.

After the majority of the interception was completed, the officers were deputized in the county. However, this was too late to remove the taint. Therefore, the evidence seized in the federal wiretap, based on illegally seized information, should have been suppressed.

#### IV. THE FOURTH CIRCUIT'S DECISION UPHOLDING PETITIONER'S CONVICTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

Even viewing the evidence in the light most favorable to the government, there was insufficient evidence to convict petitioner. The only evidence against her was inadmissible hearsay evidence, plus a taped conversation and her own testimony that she had mailed some money to her brother. Most of the six taped conversations in which she was involved, reflected she answered the phone, inquired how her brother was, gave him messages ("Daddy needs to talk to you"). While the government contended this showed a criminal "pattern", Petitioner contends she was convicted for talking to her brother, and excessive guilt by association situation. Most of the circuits have found that such a situation is insufficient for a finding of participation in a conspiracy. E.g., United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. 1980), cert. denied, 103 S. Ct. 77 (1982) (seeing defendant pick up the principal conspirators and being present when

they obtained the cocaine from defendant's car); United States v. Solis, 612 F.2d 930 (5th Cir. 1980) (Defendant was one of several brothers charged, defendant's phone was used during drug sale); United States v. Baker, 499 F.2d 845 (7th Cir.), cert. denied, 419 U.S. 1071 (1974). (Defendant present when his roommate and informant discussed drug sale and at sale).

This conflict in the circuits should be resolved by this Court.

V. PETITIONER WAS DENIED A FAIR AND IMPARTIAL HEARING.

A. THE TRIAL JUDGE PRESIDING OVER A POST-TRIAL HEARING  
AT WHICH HE TESTIFIED DENIED PETITIONER AN IMPARTIAL  
DECISION ON THE JURY TAMPERING ISSUE.

Under the Federal Rules of Evidence, Rule 605, a judge may not testify in the trial over which he presides. This has been construed to include post-trial hearings. See Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978), involving a sentencing judge testifying on the enhancement issue.

Here, a post-trial hearing was conducted by the trial judge into the effect that being photographed had upon the jury. The judge testified about his role and actions, which involved his conversations with a juror about the juror's complaint made during the trial, that he was being photographed, as were other members of the jury, by someone

unknown to them. These conversations occurred during the trial and without the knowledge of the defendants. Since the judge's actions were material in communicating with the juror, and in affecting the juror's stated apprehension, another judge should have heard the evidence and made the findings of fact on any prejudice resulting from the incident and the trial court's handling of it.

Of course, the trial judge could not be and was not cross-examined by defendant's attorney as to his actions. He made a statement for the record and then examined the juror. The Assistant United States Attorney asked one question. Then the judge made findings based on his own statement and his questions of the juror. Thus, he acted in several roles, that of witness, prosecutor and judge. His findings should, therefore, be subjected to closest scrutiny. The judge's discretion has been abused where he obviously has a preconceived idea before the hearing because of his involvement in the events which are the subject of the hearing.

The Fourth Circuit upheld the trial judge's findings of no unfair prejudice without considering the propriety or effect of the trial judge's involvement in the hearing. 717 F.2d at 1491. (App., infra, pp. 25-26). They required that there be a showing that the finding of no prejudice was "clearly erroneous," saying otherwise they could not reverse

the decision. Id. at 26. The "clearly erroneous" standard should not apply where the judge is so enmeshed in the dispute and takes such an active part in the hearing. His multi-role participation denied petitioner a fair and impartial hearing. Moreover, the judge's involvement gave him reason to find no error, in order to validate his own actions which perpetuated the prejudice to petitioner by having a jury which was concerned for their safety deliberate on her guilt or innocence. Such actions by the judge are grounds for reversal. By not even addressing this aspect of the hearing, the Fourth Circuit condoned it. This Court should reverse on this grounds alone, and not be bound by the trial court's findings in any manner.

B. PETITIONER WAS DENIED HER RIGHT TO MAKE INQUIRY  
INTO THE EXTENT OF JURY CONTAMINATION BY HAVING  
ALL JURORS TESTIFY.

When petitioner appeared for sentencing, her attorney was then informed that the trial judge was ready to hold the hearing about possible jury contamination, and that the juror with whom he had had contact, juror Denton, was present. The defendants requested that all jurors be subpoenaed to allow inquiry into the effect the photographing had upon each of them.

Juror Denton testified as to his own feelings, but added that other jurors had expressed concern over being photographed. Upon the judge's telling him the matter had been taken care of, he, following the judge's instructions, relayed this to the entire jury. Certainly there was no way to determine the effect this total incident had upon the jury panel.

The other aspect which should have also been investigated was whether juror Denton exposed jurors not previously aware of the incident, when he related the incident to them and told them he had consulted with the trial judge. Each juror was competent under Rule 606(b) of the Federal Rules of Evidence to testify as to any outside influence or extraneous prejudicial information brought to their attention. Denton, however, could only speculate as to the feelings of the others. Although he said there were no further discussions about the incident after he relayed the judge's instructions to them, this does not mean that all concern was allayed. At the hearing, knowing how many jurors had thought they were being photographed, their initial reaction, and their reactions to Denton's and the judge's actions was important in determining the impact of the incident upon the panel.

The trial judge, and the Fourth Circuit, while acknowledging that Denton stated several jurors had expressed to him similar concerns, based the finding of no possible

prejudice solely on Denton's statement that he had been reassured. The trial judge ruled that the other jurors were not involved in "the incident," (App., infra, p. 32). While they were not involved in direct communications with the trial judge, they reported they were concerned over being photographed, and any distinction between their involvement and Denton's is ridiculous. An examination of those jurors was equally as necessary as that of Denton.

Thus, although there was some evidence taken, there was not a hearing as contemplated by Remmer v. United States, 347 U. S. 227 (1954). The petitioner was not allowed to examine every juror who felt, like Denton, that outside influence was being used against him.

Moreover, the trial judge required the defendants to show bias on part of the jury. (App., infra, p. 32). However, Remmer v. United States, supra, 347 U. S. at 229, held that there was a presumption of prejudice which the government bore the burden of proving was, in fact, harmless. Thus, by using the wrong standard, the judge further erred, and petitioner was denied a fair hearing.

#### VI. PETITIONER WAS DENIED TRIAL BY A FAIR AND IMPARTIAL JURY.

The petitioner was denied a trial by a fair and impartial jury when a jury tainted by improper contact was allowed to

deliberate upon her case.

As stated in Argument V(b) above, any outside influence on the jury is presumed prejudicial. In the instant case, one juror on behalf of himself and other jurors related to the trial judge during the course of the trial that they were concerned for their safety because they thought they were being photographed upon exiting the courthouse.

The trial judge did not hold a hearing during the trial on the effect this incident had upon the jurors; indeed, he did not even notify the defendants until after the return of the verdict that he had been approached by a juror. Instead, he simply instructed the jury not to be concerned about it, without telling them what measures he had taken or who was behind the photographing. This Court in Remmer v. United States, 350 U. S. 377, 379 (1956), in holding that petitioners were entitled to a new trial, considered it important that the jury in that case did not know the outcome of the investigation. In the instant case, although juror Denton later testified he was not concerned after talking to the judge, he remained concerned enough to make inquiry of the judge immediately upon return of the verdict.

Had inquiry been made of the jury during trial, their true feelings and apprehensions could have been revealed without any infringement upon Rule 606(b) of the Federal Rules of Evidence. If necessary, alternate jurors could have been used, or a mistrial declared at that point. At

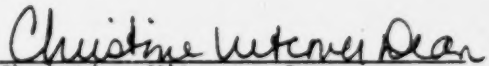
that point, a hearing would have been meaningful. As stated in Remmer v. United States, 350 U. S. at 381, at a post-trial hearing, relying upon recollection, even the particular juror involved may not be able to determine how he was affected. By that time also, the judge and juror have an investment in the verdict and are reluctant to attack it.

Lastly, by the judge discussing this matter with juror Denton, petitioner was deprived of her right to be present at every stage of the trial as provided in Rule 43(a) of the Federal Rules of Criminal Procedure. Since the judge was in effect giving the juror legal instructions, and, by asking juror Denton to tell the rest of the jury what he had said, gave instructions to the entire panel, the defendant should have been present. Under Rule 30 of the Federal Rules of Criminal Procedure, defendant could have objected, or requested further explanation of the situation to the jury.

As it was, by the trial judge keeping the entire matter secret, defendant was unknowingly tried by a jury panel which had improper outside influences brought to bear upon them. The government did not show the panel was not prejudiced to petitioner's detriment. This Court should reverse petitioner's conviction to allow her to be tried by an untainted and impartial jury.

CONCLUSION

For the foregoing reasons, petitioner contends she was denied a trial by a fair and impartial jury, that prejudicial error was committed violating her rights under the Fourth, Fifth and Sixth Amendments of the United States Constitution, both on the trial and appellate levels, and that the Fourth Circuit decision conflicts with decisions of this Court and other circuits, and that a Writ for Certiorari should issue to review this case.

  
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Attorney for Petitioner  
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No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TERESA ELEAZAR, PETITIONER

v

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

A P P E N D I X

APPENDIX TABLE OF CONTENTS

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**PUBLISHED**

**UNITED STATES COURT OF APPEALS**  
**FOR THE FOURTH CIRCUIT**

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No. 82-5274 (L)

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United States of America,

Appellee,

v.

Ronald Doyle Hines,

Appellant.

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No. 82-5275

---

United States of America,

Appellee,

v.

Gary J. Peed,

Appellant.

---

No. 82-5276

---

United States of America,

Appellee,

v.

Teresa Eleazar,

Appellant.

---

No. 82-5277

---

United States of America,

Appellee,

v.

James Maurice Jackson,

Appellant.

---

No. 82-5278

---

United States of America,

Appellee,

v.

James C. Coddington,

Appellant.

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No. 82-5286

---

United States of America,

Appellee,

v.

Jeffrey Craig Bumgardner,

Appellant.

---

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, United States District Judge.

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Argued: July 14, 1983

Decided September 9, 1983

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Before PHILLIPS, SPROUSE and ERVIN, Circuit Judges.

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William J. Sheppard (Elizabeth L. White on brief) and Gary S. Lawrence (Steven D. Kupferberg; Hugh Clifton Talton, Jr.; Christine Witcover Dean; Edwin C. Walker on brief) for Appellants; William E. Martin, Assistant United States Attorney (Samuel T. Currin, United States Attorney, Wallace W. Dixon, Assistant United States Attorney, James G. Lindsay, U.S. Dept. of Justice on brief) for Appellee.

ERVIN, Circuit Judge:

Ronald Doyle Hines, Gary J. Peed, Teresa Eleazar, James "Bubba" Jackson, James Coddington and Jeffrey Bumgardner appeal from the United States District Court for the Eastern District of North Carolina wherein they were tried for conspiracy to possess with intent to manufacture and distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and of using a communication facility to facilitate the cocaine conspiracy in violation of 21 U.S.C. § 843(b).

Viewing the evidence in the light most favorable to the government, the prosecution's case at trial established the existence of a two-tier conspiracy. The first tier was headquartered in Apex, North Carolina, under the command of James "Jacques" Provost. Jacques had two investors or partners in the first tier, Gary Peed of Virginia and James Coddington of Orlando, Florida. The first tier had three employees who acted as drug couriers, Jacques's son Darryl Provost, Peter Stisser, and Bubba Jackson. Darryl and Peter turned government witnesses and provided the crucial trial testimony against their co-conspirators.

The second tier was the smaller and local operation in Jacksonville, Florida, including Ronald Hines, Jeffrey Bumgardner and Teresa Eleazar. Contacts between the two tiers were made by Bubba Jackson, Eleazar's brother.

The jury found appellants guilty of both counts, except that Eleazar was acquitted on the telephone facilitation count. Peed, Coddington, and Jackson were sentenced to four years imprisonment plus five years probation. Hines, Eleazar and Bumgardner received six months imprisonment with five years probation.

On appeal, the appellants claim nine reversible errors in their trial. Finding no merit to any of the challenges, we affirm.

I.

In September, 1980, a double murder occurred in Jacksonville Beach, Florida. In July, 1981, two Jacksonville Beach police investigators, Officers Dorn and Maxwell, learned that "Bones" Merrill might have acted as a lookout during the murders. Bones was questioned and agreed to act as an informant in the investigation of Jacques Provost, who was suspected of having ordered the murders to avenge a delinquent drug debt and is now deceased.

Beginning on July 27, 1981, Bones made seven or eight consensually recorded phone calls from pay telephones in Jacksonville Beach to Jacques's home in St. Johns County, Florida, which was outside Dorn's and Maxwell's bailiwick. Since most of the information obtained concerned Jacques's ongoing drug operations, on July 29, 1981, the information was

turned over to Agent Alford of the Florida Department of Law Enforcement, an agency with statewide jurisdiction.

On August 29, Alford obtained an electronic surveillance warrant for Jacques's St. Johns County home. Alford eventually learned that Jacques had moved the center of his drug operations to a house in Apex, North Carolina.

Alford passed the information on to Agent Johannesen of the Federal Drug Enforcement Agency ("DEA") in Raleigh, North Carolina. Johannesen used the information to obtain a wiretap on Jacques's telephone in Apex from September 29, 1981 to October 14, 1981. Information developed from the wiretap led to the indictments of the appellants.

Appellants complain that the Apex wiretap evidence should have been suppressed because it was the fruit of the Florida consensual monitoring and electronic surveillance, which appellants contend were illegal. See Wong Sun v. United States, 371 U.S. 471 (1963). The consensual monitoring allegedly was illegal because officers Maxwell and Dorn were operating outside their jurisdiction. Appellants challenge the electronic surveillance on the grounds that it was issued based on an affidavit that contained intentional, reckless, and material misrepresentations.

Appellants contend that Maxwell and Dorn, Jacksonville Beach police officers, acted outside their jurisdiction by consensually monitoring Bones's nine pre-August

6, 1981 calls to Jacques's St. Johns County home. Maxwell and Dorn were not deputized in St. Johns County until August 6, 1981. Appellants rely on Wilson v. Florida, 403 So.2d 982 (Fla. 1980), in which Lake City, Florida, police officers conducted an investigation into Wilson's possession of drugs outside the municipal limits of Lake City. In conducting the investigation, the officers employed an electronic listening device that was hidden on an informant who purchased drugs from Wilson outside Lake City. The court held that fruits of the electronic surveillance could not form the basis for the issuance of a search warrant because the officers were without authority to conduct the investigation.

Wilson, however, is distinguishable from the present case. In Wilson, the investigation was into the possession of contraband outside Lake City. The Wilson court indicated, 403 So.2d at 984, that it would have reached a different result had the investigation been into Wilson's illegal acts within Lake City: "a municipal police officer . . . may conduct investigations outside the city limits . . . where the subject matter of the investigation originated inside the city limits, State v. Chapman, 376 So.2d 262 (Fla. 3d DCA 1979); Parker v. State, 362 So.2d 1033 (Fla. 1st DCA 1978)." Here, the subject matter of the investigations, the 1980 double murder in Jacksonville Beach, did originate within the city limits.

Of the nine pre-August 6 telephone calls, the first seven or eight were made from Jacksonville Beach, so Maxwell and Dorn were within their jurisdiction. Furthermore, since Dorn and Maxwell brought agent Alford, who had statewide jurisdiction, into the investigation on July 29, the monitoring of Bones's calls from Jacksonville were under the direction of Alford; i.e the officers acted "under color of law," 28 U.S.C. § 2511(2)(C), or "under the direction of a law enforcement officer," Fla. Stat. 934.03(2)(c).<sup>1</sup> Thus, the pre-August 6 calls comply with both the federal and state consensual monitoring statutes.<sup>2</sup>

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<sup>1</sup> 18 U.S.C. § 2511(2)(C) provides:

It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Fla. Stat. 934.03(2)(c) provides:

It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

<sup>2</sup> It is unnecessary to decide the government's claim that

Appellants contend that the application of agent Alford for the Florida wiretap contained material misrepresentations which were intentionally and recklessly made and which were necessary to the finding of probable cause and, thus, that the Florida wiretap evidence was illegally seized under Franks v. Delaware, 438 U.S. 154 (1978). The alleged misrepresentations are that (1) Bones was a collector of drug debts for Jacques, (2) Bones revealed that Jacques imported drugs and was putting together an airplane scheme involving 15 kilograms of cocaine, (3) Jacques told Bones that he had some "heavy business", wanted Bones to work for him, and was meeting with some business associates to plan a large transaction, (4) Bones and Jacques discussed the details of a trip down south, (5) Jacques told Bones that he was waiting for a phone call and

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the Jacksonville monitoring was valid because Dorn and Maxwell were "special deputies" in Jacksonville. Fla. Stat. § 30.08(4)(B) permits special deputies to conduct investigative work. The district court did not decide the question, but simply stated that "the officers may have had special deputy status [within Jacksonville] and, if so, the Jacksonville calls would have been within their jurisdiction."

We also do not reach the government's argument that the appellants have no standing since none of them had possession or privacy interests in the consensually monitored telephone calls and none of the conversations involved any of the appellants; i.e., they were neither victims nor targets of the consensually monitored calls. See 18 U.S.C. § 2510(11); Alderman v. United States, 394 U.S. 165 (1969). The district court did not address the argument and it is not clear whether it was raised below.

would know more after he received it, and (6) Darryl Provost told Bones that there was a change of plans and Bubba Jackson was going up north to collect some money.

Our review of the record, however, indicates that the alleged misrepresentations either did not occur or were immaterial: (1) during an August 3, 1981 interview of Bones by Maxwell and Dorn, Bones indicated that he collected drug debts in New York and Atlanta for Jacques; (2) during the August 3 interview, Bones and the officers discussed the plane deal; (3) while Jacques did not say he had some "heavy" business, he did say "I got two business people with me" who are "real business" people and "ah man, if you could see all the [stuff] that Mike and Bang put me in its unbelievable," and arranged for Bones to come to Jacques's home to discuss work; (4) Jacques told Bones on July 30, 1981 that "I was thinking of sending you with [Darryl] down south" and "I don't know what time you guys be leaving, but I would around twelve"; (5) although Jacques did not say he was waiting on a phone call, he did tell Bones that for the moment he had nothing for Bones to do, but that he was "waiting for somebody to be here" so Bones should call back "around supper,"; and (6) Bones's telephone call of August 1 and August 5 interview, when read together, indicate that Jackson had traveled north and Jacques was waiting for him to bring back some money. Not only are there no material misrepresentations, but there is no indication that the minor

inaccuracies were intentional or reckless. Thus, the Florida wiretap evidence was not illegally seized under Franks.

## II.

The Interstate Agreement on Detainers Act ("IAD") provides that if trial is not held within 120 days of the date a prisoner arrives in a receiving state, the charges are to be dismissed with prejudice. 18 U.S.C. Appx. Art. IV(C), V(C). The running of the 120-day limitation, however, may be tolled by the district court "for good cause shown in open court, the prisoner or his counsel being present." Id.

The government brought Bubba Jackson to North Carolina for trial from Florida, where he was in custody, by detainer. The 120-day limitation began running on April 13, 1982, the date Jackson arrived in North Carolina. See United States v. Bryant, 612 F.2d 806, 810-11 n.7 (4th Cir.), cert. denied, 446 U.S. 920 (1980). The trial commenced on August 24, 1982, 133 days later. The parties dispute whether the running of the 120-day limitation period was tolled for at least 13 days.

In United States v. Odom, 674 F.2d 228, 230 (4th Cir.), cert. denied, 102 S.Ct. 2946 (1983), this court held that a defendant waives the 120-day limitation by requesting to be treated in a manner inconsistent therewith. The Odom court also held that the periods excluded under the Speedy Trial Act, see 18 U.S.C. § 3161(h)(1)(F) (e.g., period from filing to

disposition of pretrial motion) likewise should be excluded under the IAD. Thus, the government seeks to exclude all days from the filing of pretrial motions to the prompt disposition of those motions, since on April 26 Jackson moved the court to allow him to adopt the motions of his co-defendants. Hearings alone on these pretrial motions took 16 days (May 20-31, June 11-12, June 21-22). Indeed, in rejecting Jackson's motion for dismissal under the IAD, the district court found that Jackson's joining in the motion to suppress the wiretap evidence, without more, amounted to a waiver of the 120-day limitation.

Of critical importance in the instant situation are defendant Jackson's motion to suppress evidence seized as a result of various electronic surveillances. Had the motion to suppress been allowed, it is doubtful that the government could have proceeded to trial since its case was based almost entirely upon this evidence. At least forty-seven days were required by the Magistrate to consider fully and make a recommendation concerning these motions to suppress. Since the trial commenced thirteen days after the running of the 120-day limitation, the 47-day delay caused by defendant Jackson's motions to suppress provides sufficient justification for the denial of defendant Jackson's motion to dismiss based upon the Interstate Agreement on Detainers.

The government also lists several continuances (i.e. requests to be treated inconsistently with the IAD) granted at Jackson's request: (1) at the request of Jackson's attorney, pretrial hearing was delayed three days from June 7 to June 10

(2) the June 10-12 hearings were continued nine days until June 21 at the request of all attorneys, including Jackson's; (3) at Jackson's attorney's request, defense counsel were given ten days, from June 22 until July 2 to file additional memoranda; and (4) Jackson's attorney, as well as other defense counsel, indicated that the clerk's suggested trial date of July 19 was not satisfactory, and the trial eventually was set for August 16.

Jackson attacks the government's assertion that he sought continuances. He cannot, however, rebut the government's claim that he sought an additional ten days to file memoranda or that he indicated that a July 19 trial date was unsatisfactory. Furthermore, even without considering the continuances, Jackson must be deemed to have waived the 120-day limitation by joining in the co-defendants' motions, especially the motion to suppress the wiretap evidence.

It is not surprising that Jackson was held beyond 120 days given defense counsel's extensive pretrial motions. Jackson joined in those motions, which took a substantial amount of time to resolve, and then surprised the district court by moving for a dismissal under the IAD on the first day of trial. Jackson sought to benefit from the pretrial motions which necessarily resulted in delays, and cannot now claim that he is aggrieved under the IAD by those delays.

### III.

Appellants argue that the indictment did not charge possession of a controlled substance listed under 21 U.S.C. § 812 Sched. II, and that the government failed to prove possession of a § 812 Sched. II controlled substance. The arguments are meritless.

The indictments charge a conspiracy to possess with intent to distribute "a schedule II narcotic controlled substance, to-wit: cocaine, in violation of the provisions of 21 United States Code, § 841(a)(1)." Appellants note that possession of some cocaine isomers is legal and conclude that the use of the single word "cocaine" makes the indictment insufficient. The argument ignores the placing of "cocaine" in apposition to the phrase "a schedule II controlled substance." The indictment thus clearly contains a sufficient description of the "controlled substance" element of the offense.

Appellants claim that the government failed to prove that the cocaine here was the illegal kind of cocaine that is a controlled substance under 21 U.S.C. § 812 Sched. II. Appellants point out that the government's expert testified that the seized substance was "cocaine" but that it was not a "narcotic." Since the statutory definitions of the narcotic cocaine and controlled substance cocaine are similar, see 21 U.S.C. §§ 802(16), 812 Sched. II.(a)(4), appellants conclude

that the evidence was consistent with a conspiracy to distribute the legal kind of cocaine.

The government's expert, however, was unequivocal that the seized cocaine was a controlled substance within the meaning of 21 U.S.C. § 812 Sched. II. Her statement that in chemical terms cocaine is "a stimulant or basic euphoriant," but not a "narcotic" did not affect her conclusion that the seized cocaine was a controlled substance within the meaning of 21 U.S.C. § 812 Sched. II. Furthermore, she stated only that cocaine chemically is not a narcotic, not that cocaine is not a narcotic as defined in 21 U.S.C. § 802(16). Moreover, the offense charged, violation of 21 U.S.C. § 841(a), requires proof of "possess[ion] with intent to manufacture, distribute, or dispense, a [§ 812 Sched. II] controlled substance." Whether cocaine is a narcotic within the meaning of 21 U.S.C. § 802(16) was irrelevant to the determination of guilt or innocence.<sup>3</sup>

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<sup>3</sup> Thus, the trial court instructed the jury that whether cocaine is a narcotic is

not material to the guilt or innocence of any of the defendants in the charges as contained in the Bill of Indictment. Therefore, it is not necessary for the government to prove that the substance referred to in the indictment was a narcotic.

I instruct you that cocaine is a Schedule II controlled substance. It is a

IV.

Out-of-court statements by co-conspirators made "during the course of and in furtherance of the conspiracy" are not hearsay and are admissible. Fed. R. Evid. 801(d)(2)(E). Their admissibility turns on "the existence of substantial evidence of the conspiracy other than the statement itself." United States v. Dockins, 659 F.2d 15, 16 (4th Cir. 1981). Whether such evidence exists is a question for the trial judge. Fed. R. Evid. 104; United States v. Jones, 542 F.2d 186, 203 n.33 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

Appellants, relying on the Fifth Circuit decision in United States v. James, 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979), argue that it was error for the trial court here not to hold a hearing to determine the existence of the conspiracy before any of the co-conspirator statements were admitted in the case-in-chief. This court, however, does not require the James hearing. Instead, a trial judge retains the option to admit conditionally the declarations of co-conspirators before the conspiracy has been independently

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violation of the laws of the United States for two or more persons to conspire or join together in an agreement to commit an offense in violation of the laws of the United States relating to cocaine.

established, subject to the subsequent fulfillment of that factual predicate. United States v. McCormick, 565 F.2d 286, 289 n.5 (4th Cir.), cert. denied, 434 U.S. 1021 (1978). The district court safeguards the defendant's rights by being prepared either to declare a mistrial or to dismiss the case if the government fails to prove aliunde that a conspiracy existed. Here, that declaration was unwarranted since the existence of a conspiracy was proved by a preponderance of the independent evidence. Indeed, appellants do not challenge the district court's finding that there was sufficient independent evidence of the conspiracy among Coddington, Jackson, and Peed. Rather, they claim a lack of independent evidence that Eleazar, Bumgardner, and Hines were part of that conspiracy. Our review of the evidence, however, indicates otherwise. The recorded conversations of Bumgardner, Hines and Eleazar with Jackson, the go-between of this two-tiered conspiracy, are replete with references by them to their cocaine dealings. See Fed. R. Evid. 801(d)(2)(4). Although Eleazar made only two comments during those calls, one comment -- "Ronnie got all that stuff" -- apparently informed Jackson that a cocaine delivery had been accomplished and she admitted sending money, which other evidence indicated was in payment for drugs, under a false name to Jackson. This independent evidence was sufficient to establish their participation in the two-tier conspiracy.

V.

During the course of the trial, evidence of appellants' bad acts other than the cocaine conspiracy was introduced: (1) Stisser testified that he delivered cocaine to Coddington on a date subsequent to the period of the conspiracy charged; (2) references were made to marijuana dealings before the inception of the cocaine conspiracy; (3) Darryl Provost and Stisser testified that they dealt in quaaludes with Jacques Provost; and (4) Eleazar testified that Jackson was a bone jumper. Appellants argue that they were unfairly prejudiced by the other acts evidence because (1) the consideration of such evidence was not limited to the defendants involved in the acts, thus allowing the government to prove guilt by association, and (2) the evidence was inadmissible under Fed. R. Evid. 404 as allowing the government to prove guilt by bad character.

While other bad acts evidence is not admissible to show the character of the accused, it is admissible to show motive, intent, absence of mistake, and the like. Fed. R. Evid. 404(b). Thus, the district court here instructed the jury:

[I]f you, the jury, should find beyond a reasonable doubt, from other evidence in the case, that the accused did the acts charged in this indictment, then the jury may consider evidence as to some other act of a similar or like nature, on the part of the accused, in determining the state

of mind or intent, with which the accused did the act which is charged in the indictment. And where proof of an alleged similar act, done at some other time or place, is clear and conclusive, the jury may, but is not obligated to, draw the inference and find that in doing the act charged in this indictment, the accused acted wilfully and not because of mistake or accident or other innocent reason. (emphasis added).

Not only did that instruction limit the jury's consideration of the other acts evidence to proof of wilfullness or absence of mistake, but it also limited consideration to the particular accused who performed the other act.

Furthermore, the specific other acts evidence admitted satisfied Rule 404(b) and the probativeness-prejudice balancing requirement of Rule 403. Stisser testified that he delivered cocaine to Coddington in late October, several weeks after the conspiracy alleged in the indictment. Nevertheless, this court has held that "subsequent conduct may be highly probative of prior intent." United States v. Hadaway, 681 F.2d 214, 217 (4th Cir. 1982). The probativeness is especially great here given the closeness in time -- several weeks -- of the similar acts.

Although the marijuana conspiracy counts were severed before trial on the grounds that "evidence concerning the marijuana conspiracy may very well be prejudicial to the defendants not charged in those counts," that does not automatically require a finding of unfair prejudice because of

the limited references to marijuana dealings in the cocaine trial. Presumably, if the counts had not been severed, a significantly higher quantity of evidence concerning the marijuana conspiracy would have been introduced, thereby increasing the possibility of prejudice. Here, the limited references to marijuana dealings in order to show intent concerning the cocaine dealings were proper under Rule 404(b). See United States v. Brugman, 655 F.2d 540, 543-45 (4th Cir. 1981) (evidence concerning marijuana and hashish dealings admissible under Rule 404(b) on charge of cocaine conspiracy). The same reasoning applies to the references to quaalude dealings.

While Eleazar's testimony about Jackson being a bond jumper was not admissible under Rule 404(b), the evidence was elicited by Eleazar's defense counsel, not the government, and immediately struck by the district court as inadmissible hearsay with the instruction to the jury to disregard it. We discern no reversible error in the district court's handling of the inadmissible testimony. See United States v. Johnson, 610 F.2d 194, 197 (4th Cir.), cert. denied, 446 U.S. 911 (1980), ("[a]bsent . . . misconduct on the part of the government counsel, the courts generally have discerned no reversible error where the trial court has acted promptly in sustaining an objection and advising the jury to disregard the testimony).

## VI.

The government bears the burden of proving the single conspiracy it charged in the indictment. On appeal, this court must determine whether the evidence, when viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), supports the jury's finding of a single conspiracy. If not, reversal is required only where proof of the multiple conspiracies prejudiced the defendants' substantial rights. United States v. Coward, 630 F.2d 229, 231 (4th Cir.), cert. denied, 456 U.S. 946 (1982).

Appellants argue that their convictions were flawed because the government proved ten conspiracies instead of the single conspiracy charged. Appellants view the evidence as showing a wheel conspiracy with Peed, Coddington, and Jackson at the center and Hines, Eleazar, and Bumgardner as one of the spokes. Since the government did not show that Hines, Bumgardner, and Eleazar knew of the other spokes in the conspiracy, the three could not be considered members of the overall wheel conspiracy. Absent proof of such knowledge, the evidence shows numerous separate conspiracies (i.e., unrelated spokes). We cannot agree.

Viewing the evidence in the light most favorable to the government, a two-tiered conspiracy was shown. The first level included Peed, Coddington, and Jackson and the second included Bumgardner, Hines, and Eleazar. Jackson was the link between the two tiers. The first tier was the wholesaler and

the second the retailer. This chain conspiracy is not unlike other multi-level schemes that have been found to constitute a single conspiracy. See United States v. Aqueci, 310 F.2d 817, 826 (2d Cir.), cert. denied, 272 U.S. 959 (1963) (chain narcotics distribution conspiracy extends several levels from importation through selling of drugs to user). This would be a different case if the government attempted to charge retailers, i.e., other spokes, other than Bumgardner, Hines, and Eleazar. Here, however, the evidence clearly shows that those three were part of a single retail operation.

The government proved at most two conspiracies, separate wholesale and retail conspiracies.<sup>4</sup> Nevertheless, proof of those two separate conspiracies would not have prejudiced appellants under Coward since the jury would not have been confused into imputing guilt to members of one conspiracy because of the illegal activities of the other conspiracy. With only two conspiracies, each at a distinct level, and simple in operation, the jury was not likely to confuse evidence concerning one level as being relevant concerning the other. Cf. Kotteakos v. United States, 328 U.S. 750 (1946) (proof of separate conspiracies with numerous defendants where conspiracies complex amounts to prejudice).

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<sup>4</sup> That view of the evidence requires disregarding the substantial evidence that Jackson linked the two levels.

## VII.

Agent Johannesen testified at trial against Jackson. His trial testimony accurately reflected the dollar amount and quantity of a certain transaction involving Jackson. Before the grand jury, Johannesen had overstated the dollar amounts and quantity. In order to impeach Johannesen's testimony, Jackson's attorney sought to introduce the entire written grand jury testimony of Johannesen. When Coddington's counsel objected to the introduction of the entire written testimony on the grounds of irrelevancy, the district court limited Jackson's attorney to introducing the inconsistent statements by having Johannesen read to the jury his prior inconsistent statements. Jackson now argues that the limitation was error and the written transcript should have been submitted to the jury. The argument is frivolous. The district court did not abuse its discretion. The jury was made aware of the prior inconsistent testimony and protected from other irrelevant (and perhaps prejudicial) evidence in Johannesen's grand jury testimony.

## VIII.

Eleazar and Hines argue that the evidence is insufficient to support their convictions. Viewing the evidence in the light most favorable to the government, however, the evidence is sufficient to support both convictions.

Most of Jackson's calls were made to Eleazar's telephone in Florida. During one call, Eleazar indicated that a cocaine delivery involving Hines had been accomplished. Later during that conversation, Bumgardner informed Jackson that Eleazar "went by and picked it up," the "it" meaning cocaine." In another conversation, Eleazar told Jackson, "Bumgardner needs to talk to you," whereupon Jackson and Bumgardner proceeded to discuss a cocaine deal. Eleazar also sent money to Jackson, under instructions to use a false name, and evidence indicated that the money was in payment for drugs. Although Eleazar offered her own version of events, the jury apparently did not accept her story, and viewing the evidence favorably toward the government, her conviction must stand.<sup>5</sup>

Ronald Hines claims a lack of proof as to his identity as a participant in the conspiracy because he was not identified pursuant to Fed. R. Evid. 901(b)(6). That rule allows "[b]y way of illustration only" identification of a telephone caller by evidence that the call was made to a number assigned to him. Hines claims that the proof of his identity was inadequate because "the called party only identified

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<sup>5</sup> The verdict of not guilty on the use of the telephone count is not inconsistent because the jury could have convicted her on the conspiracy count for picking up the drugs, and sending the money, which did not involve her use of the telephones.

himself as 'Ronnie'. The number . . . is not subscribed to by a Ronnie." Hines also points out that there is no proof that he was at the residence at the time of the call. Nor was the recorded voice identified as his. His argument is completely without merit.

Not only did the conversant identify himself as "Ronnie," but the phone was registered in the name of his parents and Hines was at the house when a DEA investigator visited the house. That evidence is sufficient to establish Hines's identity as the conversant.

#### IX.

One day during the trial, an FBI agent photographed persons leaving the courthouse and was noticed by juror Denton. Juror Denton advised the court and was informed that the photographs were not being made of jurors, that there was no cause for concern, and that the matter should be disregarded. At a post-trial hearing on the possible prejudicial influence of the picture-taking episode, juror Denton indicated that after receiving the court's assurances, he was not concerned about the photographing and the incident did not affect his deliberations. Nor was the incident further discussed by him or the other jurors after he conveyed the court's assurances to the other jurors. The district court considered Denton's testimony credible and found that the episode had no prejudicial influence on the jury. That finding is not clearly

erroneous. Under Smith v. Phillips, 455 U.S. 209 (1982), and Remmer v. United States, 350 U.S. 377 (1956), appellants were entitled to a hearing, which they received, on the possible prejudicial impact of the episode. Absent a showing that the district court's finding of no unfair prejudice was clearly erroneous, we cannot reverse.

X.

For the foregoing reasons, the convictions are

AFFIRMED.

CLERK'S OFFICE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
UNITED STATES COURTHOUSE  
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RICHMOND, VIRGINIA 23219-3599

WILLIAM K. SLATE, II  
CLERK

TELEPHONE  
1804: 771-2313  
FIS 925-2313

November 16, 1982

Ms. Christine W. Dean  
P. O. Box 667  
Raleigh, NC 27602

Re: 82-5276, USA v. Teresa Eleazer (CR 82-8-04-CR-5)

Dear Ms. Dean:

Per our telephone conversation of November 15, 1982, enclosed please find an order whereby you have been appointed to represent the appellant shown above in lieu of Mr. Allen Tew who has been relieved.

Enclosed are the following:

- (1) Counsel of Record form
- (2) Check List (to appellant's counsel only)
- (3) Policy Memoranda
- (4) Local Rules of this Court
- (5) Appointment and Voucher for Counseling Services (CJA Form 20) along with information regarding appointments under the Criminal Justice Act

As I advised you by telephone, this case has been consolidated with five others. By copy of this letter, I am advising Mr. Tew of your appointment as well as the other attorneys in these appeals. Should you have any questions, please do not hesitate to call me.

Sincerely yours,

WILLIAM K. SLATE, II

By 

Deborah A. Davenport  
Deputy Clerk

/dd

cc: Allen Roger Tew, Esq.  
Hugh Clifton Talton, Jr., Esq. (Case No. 82-5274(L))  
Gary S. Lawrence, Esq. (Case No. 82-5275)  
William J. Sheppard, Esq. (Case No. 82-5277)  
Steven D. Kupferberg, Esq. (Case No. 82-5278)  
Edwin C. Walker, Esq. (Case No. 82-5286)  
Sidney M. Glazer, Esq. (Counsel for Appellee)  
J. Douglas McCullough, Esq. (Counsel for Appellee) 27

FILE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

NOV - 8 1982

J. RICH LEONARD, CLERK  
U. S. DISTRICT COURT  
E. DIST. NO. CAR.

No. 82-8-CR-5

UNITED STATES OF AMERICA

v.

JEFFREY CRAIG BUMGARDNER,  
et al.

ORDER

Ch. 22 #30, p. 153

This matter is before the Court on motion of defendants for a new trial based on an incident occurring during the trial involving the jury.

FACTUAL BACKGROUND

The trial was begun at 10:00 a.m. on 24 August 1982 with the selection of a jury consisting of twelve regular and two alternate members. On 25 August 1982, the jury was impaneled and the trial begun. During the course of the trial, the names of Costello Ramey and Doug Ross were mentioned as suppliers of drugs to the organization in which the defendants were involved. On 1 September 1982, Costello Ramey and Doug Ross were called as witnesses by one of the defendants and each took the fifth amendment. Court adjourned at 4:30 p.m. on that date, and shortly thereafter juror, Bryant Deaton, reported to Susan Umstead, law clerk for the presiding judge, that someone was taking pictures of jurors as they left the courthouse. Mr. Deaton was brought into the Judge's Chambers and, at that time, advised the Court that as he and some of the other jurors were leaving the main entrance of the courthouse an unidentified

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individual sitting in a car parked at the curb in front of the courthouse appeared to be taking pictures of the jurors. Mr. Deaton further informed the Court that he had taken down the license number of the automobile. The Court, thereupon, took the slip of paper on which the license number was written down by the juror, advised the juror that he would look into the matter and excused him. Immediately thereafter, the Court requested an FBI agent to come to chambers. Agent Albert P. Koehler responded, and he was advised of the incident and requested by the Court to immediately investigate the matter and report back to the Court as promptly as possible.

At approximately 8:00 a.m. on 2 September 1982, Agent Koehler came to chambers and reported to the Court that the photographs were being taken by another FBI agent, James J. Roche, Jr., of the two suspected drug dealers, Ramey and Ross. When juror Deaton arrived at court, he was brought to chambers by Susan Umstead, law clerk for the presiding judge, at which time he was advised that the Court had ascertained the identity of the photographer. The Court further assured the juror that photographs were not being made of jurors, that there was no cause for concern by him or any other juror, and that he should disregard the incident entirely. The Court further advised juror Deaton that the Court was not at liberty to discuss the matter further at that time but could possibly do so at some later date.

On 3 September 1982 at 10:00 a.m., the jury retired to begin its deliberations. At 7:23 p.m. the jury returned

its verdict. Before leaving the courtroom, juror Deaton inquired of the Court further concerning the picture-taking incident. The Court again advised juror Deaton that it was not at liberty to discuss the matter further at that time but would, at a later date should he make further inquiry. The jury was then discharged and the Court advised the parties of the incident and what had transpired thereafter.

Motions for a new trial based on alleged prejudice resulting from the picture-taking incident have been filed by all defendants. On 30 September 1982, a hearing was conducted at which time Agents Koehler, Roche and Susan Rowley, who was in the automobile with Agent Roche at the time of the incident, and juror Deaton testified. All were examined initially by the Court and all defense counsel were given an opportunity to question the witnesses.

#### CONTENTIONS OF THE DEFENDANTS

The defendants contend first, that the Court erred in not bringing the matter to their attention at the time it occurred and conducting a hearing involving one or more of the jurors and secondly, that the cause of the defendants was prejudiced by the incident. Defendants principally rely on Remmer v. United States, 347 U.S. 227 (1954) and Smith v. Phillips, \_\_\_ U.S. \_\_\_, 71 L.Ed.2d 78 (1982).

#### DECISION

The presence of cameras of all varieties in and about the courthouse is an everyday occurrence. In the Eastern District of North Carolina, the taking of photographs in the courtroom,

court offices, or in corridors immediately adjacent thereto is prohibited by local rule. Local Rule 8.00, E.D.N.C. The courtroom in the Raleigh Courthouse is located on the seventh floor of the Federal Building. Although the local rule prohibits the taking of photographs on the seventh floor, it is not unusual for photographers to be stationed in the lobby where the elevators empty and out in front of the courthouse. Thus, the taking of photographs of participants in a court proceeding if not an everyday occurrence is, at least, not an unusual occurrence.

Remmer involved a situation where a remark had been made to a juror during trial that the juror could profit by bringing in a verdict favorable to the defendant. Smith involved a situation where a juror had made application for employment in the prosecuting attorney's office while serving as a juror in the case. Other cases brought to the attention of the Court or disclosed by its own research involve contact with or by a juror. None have been found in which it has been contended that the jury was prejudiced because of an event not directly involving a member of the jury panel.

The Court's concern at the time of the incident was first, to determine who the photographer was and second, to alleviate any fears on the part of the juror that there was any threat to his safety or well-being. Both of these objectives were accomplished with a minimum of effort and without disruption of the trial. When questioned, juror Deaton testified that he had no apprehension or concern for his safety. He further testified that the incident did not in any way affect his delibe-

rations or decision as a juror and that he felt that it did not in any way affect the decision of the other jurors. He specifically testified that after the Court assured him there was nothing to be concerned about that the matter was not mentioned by him or any of the jurors again.

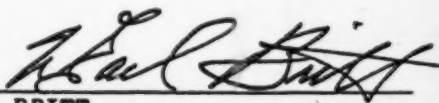
The burden is on defendants to show bias on the part of the jury. Smith v. Phillips, supra. This they have failed to do.

Defendants contend that the Court should have required all of the jurors to be brought in as witnesses and subjected to examination by the Court and cross-examination by the attorneys. The Court disagrees, finding that the testimony of the juror Deaton is highly credible and believable, that the incident was not mentioned again during the course of the trial or jury deliberations. That being true, it is inconceivable to the Court that any of the other jurors, not directly involved in the incident, could have been prejudiced or influenced in any way.

The motions for new trial are denied.

AND IT IS SO ORDERED.

This 8 November 1982.

  
W. EARL BRITT  
United States District Judge

DEFENDANT

TERESA FLEAZER

DOCKET NO. 82-8-04-CR-5  
RALEIGH DIVISION

JUDGMENT AND PROBATION/COMMUNITY ORDER

In the presence of the attorney for the government  
the defendant appeared in person on this date

MONTH DAY YEAR  
September 30 1982

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Allen L. Jew - Court-appointed

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☒ NOT GUILTY by the jury in Count 5

FINDING & JUDGMENT

There being ~~pleading~~ verdict of ☐ NOT GUILTY. Defendant is discharged from the offense of using communication facility in conspiracy.  
☒ GUILTY by the jury in Count 1, on 9/3/82

Defendant has been convicted as charged of the offense(s) of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C., Secs. 841(a)(1) & 846, as charged in Count 1, as contained in the Superseding Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

COUNT 1 - Five (5) years - and pursuant to 18 U.S.C., Sec. 3651 the defendant be confined in a jail-type or treatment institution for a period of six (6) months, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation for a period of five (5) years, to commence upon the defendant's release from confinement, under the general conditions as recorded in the Clerk's Office.

SPECIAL CONDITIONS OF PROBATION

1. Defendant is to comply with all local, state and federal laws.
2. Defendant is to comply with the rules and regulations of the Probation Office.
3. Defendant is to abstain from the use of controlled substances and submit to a search by the Probation officer or any other lawful officer without the necessity of a warrant and to the administration of any generally accepted test to determine the use of controlled substance including but not limited to urinalysis.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General. Defendant is allowed to go under existing bond and to report at her own expense to the designated facility upon notification from the U.S. Marshal.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

THUMB BY  
☒ U.S. District Judge

W. EARL BRITT

Date September 30, 1982

☒ U.S. Magistrate

*Sydney*

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION

No. 92-8-01-CR-5  
No. 92-8-02-CR-5  
No. 92-8-03-CR-5  
No. 92-8-04-CR-5  
No. 92-8-05-CR-5  
No. 92-8-06-CR-5  
No. 92-8-07-CR-5  
No. 92-8-08-CR-5  
No. 92-8-09-CR-5  
No. 92-8-10-CR-5

JUN 15 1992  
J. MICHAEL LEONARD, CLERK  
U. S. DISTRICT COURT  
E. DIST. NO. C.M.

UNITED STATES OF AMERICA )

vs. )

INDICTMENT  
(Superseding)

JEFFREY CRAIG BUNGARDNER )  
GARY J. FEED, )  
a/k/a "George" )  
RONALD DOYLE HINES )  
TERESA ELEAZER )  
DARREY. STEPHEN PROVOST )  
JAMES MAURICE JACKSON, )  
a/k/a "Bubba" )  
JAMES C. CODDINGTON )  
PETER DAVID STISSER )  
DONALD CHRISTOPHER PROVOST )  
TIMA PITTS PROVOST )

The Grand Jury charges:

COUNT ONE

21 U.S.C.  
§ 841(a)(1)  
& § 846

That beginning on or about the 28th day of September, 1981, and continuing thereafter until on or about the 14th day of October, 1981, in the Eastern District of North Carolina and elsewhere, JEFFREY CRAIG BUNGARDNER, GARY J. FEED, a/k/a "George," RONALD DOYLE HINES, TERESA ELEAZER, DARREY. STEPHEN PROVOST, JAMES MAURICE JACKSON, a/k/a "Bubba," JAMES C. CODDINGTON, and PETER DAVID STISSER, hereafter named as defendants, did knowingly, intentionally, and unlawfully combine, conspire, confederate and agree together and with each other and with James Jacques Provost, now deceased, and with diverse other persons whose names are to the Grand Jury unknown, to violate the provisions of Title 21, United States Code, Section 841(a)(1).

The object of the conspiracy was:

That the defendants and others would knowingly, intentionally, and unlawfully possess with intent to manufacture and distribute a Schedule II narcotic controlled substance, to wit: cocaine, in violation of the provisions of Title 21, United States Code, Section 841(a)(1).

OVERT ACTS

1. From on or about September 28, 1981, until October 14, 1981,

James Jacques Provost, DONALD CHRISTOPHER PROVOST, and PETER DAVID STISSER occupied a house located at Rural Road #1141, Route #2, Apex, North Carolina.

2. From on or about September 28, 1981, until on or about October 14, 1981, DARRYL STEPHEN PROVOST and TIMA PITTS PROVOST either jointly or separately occupied a house located at 204 Trails End, Raleigh, North Carolina.

3. From on or about September 28, 1981, until on or about October 14, 1981, telephone #919-362-0216 was subscribed to in the name of DONALD CHRISTOPHER PROVOST. That telephone was installed in the residence at Rural Road #1141, Route #2, Apex, North Carolina.

4. During the period of time pertinent herein, James Jacques Provost had agreed to pay PETER DAVID STISSER two hundred dollars (\$200.00) per week plus a special rate during times of travel on assignment away from the aforementioned Apex, North Carolina, residence.

5. On or about the 2nd day of October, 1981, James Jacques Provost and GARY J. FEED, a/k/a "George," discussed the movement of a substance described as 82-88 percent pure from Apex, North Carolina, to Oakton, Virginia.

6. On or about October 2, 1981, DARRYL STEPHEN PROVOST left Apex, North Carolina, for the Oakton, Virginia, area to deliver about seven (7) ounces of cocaine plus cutting agents to GARY J. FEED, a/k/a "George."

7. On or about October 2, 1981, at about 11:30 p.m., DARRYL STEPHEN PROVOST was stopped by Virginia State Police near Fairfax, Virginia, at which time the approximately seven (7) ounces of cocaine plus cutting agents were seized.

8. On or about the 4th day of October, 1981, DONALD CHRISTOPHER PROVOST talked about DARRYL STEPHEN PROVOST getting caught with a pound.

9. On or about October 4, 1981, DARRYL STEPHEN PROVOST telephoned PETER DAVID STISSER. STISSER told him "George" should be taking care of things up there, just sit there, and we're behind you brother.

10. On or about October 4, 1981, JAMES C. CODDINGTON called James Jacques Provost and they talked about "Bubba" traveling to Florida. CODDINGTON asked if Provost wanted 3 to 5 C.O.D.

11. On or about October 5, 1981, JAMES MAURICE JACKSON, a/k/a "Bubba," called telephone #904-354-5409 and asked for Ronnie. Ronnie told JACKSON "it was 1/2 gram short." JACKSON asked Ronnie if he had the 50; Ronnie replied, 30 of it. Telephone #904-354-5409 is subscribed to by H. C. Minas.

12. On or about the 8th day of October, 1981, JAMES C. CODDINGTON telephoned and talked to PETER DAVID STISSER. He told STISSER that the Florida delivery was 3 1/2 short. STISSER said his scales were possibly wrong.

13. On or about October 8, 1981, JAMES MAURICE JACKSON, a/k/a "Bubba," called his sister, TERESA ELEAZER, and she told JACKSON that "Ronnie got all that stuff." TERESA ELEAZER then put JEFFREY CRAIG BUNGARDNER on the phone and JACKSON asked BUNGARDNER "how much was in there." BUNGARDNER responded, "all of it 'cept for a half" and "Teresa picked it up and took it back to Ronnie."

14. On or about the 12th day of October, 1981, JAMES MAURICE JACKSON, a/k/a "Bubba," told PETER DAVID STISSER that James Jacques Provost wanted everything out of the house and hidden in the bushes behind the house.

Said acts, and other overt acts both known and not known to the Grand Jury, being committed in the furtherance of said conspiracy to violate the provisions of Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 846.

#### COUNT TWO

21 U.S.C.  
§ 841(a)(1)  
& § 846

That beginning on or about late August, 1981, the exact date being unknown to the Grand Jury, and continuing thereafter until on or about the 14th day of October, 1981, in the Eastern District of North Carolina and elsewhere, DARRYL STEPHEN PROVOST, JAMES MAURICE JACKSON, a/k/a "Bubba," PETER DAVID STISSER, DONALD CHRISTOPHER PROVOST, and TINA PITTS PROVOST, hereafter named as defendants, did knowingly, intentionally, and unlawfully combine, conspire, confederate and agree together and with each other and with James Jacques Provost, now deceased, and with diverse other persons whose names are to the Grand Jury unknown, to violate the provisions of Title 21, United States Code, Section 841(a)(1).

The object of the conspiracy was:

That the defendants and others would knowingly, intentionally, and unlawfully possess with intent to distribute a Schedule I controlled substance, to wit: marijuana, in violation of the provisions of Title 21, United States Code, Section 841(a)(1).

#### OVERT ACTS

1. In late August or early September, 1981, the exact date being to the Grand Jury unknown, PETER DAVID STISSER traveled from Apex, North Carolina, to Indiantown, Florida, and returned to North Carolina with 180 pounds of marijuana.

2. This marijuana was stored at the residence of DARRYL STEPHEN PROVOST and TINA PITTS PROVOST at 204 Trails End, Raleigh, North Carolina.

3. On or about October 12, 1981, JAMES MAURICE JACKSON, a/k/a "Bubba," called TINA PITTS PROVOST and asked if she had any "smoke" at her house. TINA PITTS PROVOST responded, "just green stuff." TINA PITTS PROVOST commented that

"someone was supposed to come move some of this stuff over here, is anybody going to do that?; it's in the garage and it's all located in one corner." JACKSON asked if TINA PROVOST was going to leave that other smoke there and TINA responded, "Yes, you wanna get it? There's not a whole bunch there and it's not the greatest."

4. On or about the 12th day of October, 1981, JAMES MAURICE JACKSON, a/k/a "Bubba," told PETER DAVID STISSER that James Jacques Provost wanted everything out of the house and hidden in the bushes behind the house.

5. On the same day as in overt act no. 4 above, PETER DAVID STISSER told DONALD CHRISTOPHER PROVOST that they would move "the stuff" during half-time.

Said acts, and other overt acts both known and not known to the Grand Jury, being committed in the furtherance of said conspiracy to violate the provisions of Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 846.

COUNT THREE

21 U.S.C.  
§ 843(b)

That on or about the 2nd day of October, 1981, DARRYL STEPHEN PROVOST did knowingly and intentionally use a communication facility, that is, a telephone (919-362-0216) located in the Eastern District of North Carolina, in facilitating the knowing, intentional, and unlawful conspiracy to possess with intent to manufacture and distribute a Schedule II narcotic controlled substance, to wit: cocaine, a felony under Title 21, United States Code, Section 841(a)(1), when he talked with James Jacques Provost by telephone about 5:09 p.m., in violation of Title 21, United States Code, Section 843(b).

COUNT FOUR

21 U.S.C.  
§ 843(b)

That on or about the 5th day of October, 1981, JAMES MAURICE JACKSON, a/k/a "Bubba," and DONALD DOYLE NINES did knowingly and intentionally use a communication facility, that is, a telephone (919-362-0216) located in the Eastern District of North Carolina, in facilitating the knowing, intentional, and unlawful conspiracy to possess with intent to manufacture and distribute a Schedule II narcotic controlled substance, to wit: cocaine, a felony under Title 21, United States Code, Section 841(a)(1), when they talked to each other by telephone about 7:32 p.m., in violation of Title 21, United States Code, Section 843(b).

COUNT FIVE

21 U.S.C.  
§ 843(b)

That on or about the 5th day of October, 1981, TERESA KLEAZER and JEFFREY CRAIG BUNGARDNER did knowingly and intentionally use a communication facility, that is, a telephone (919-362-0216) located in the Eastern District of North Carolina, in facilitating the knowing, intentional, and unlawful conspiracy

to possess with intent to manufacture and distribute a Schedule II narcotic controlled substance, to wit: cocaine, a felony under Title 21, United States Code, Section 841(a)(1), when they talked with JAMES MAURICE JACKSON, a/k/a "Bubba," by telephone about 8:16 p.m., in violation of Title 21, United States Code, Section 843(b).

COUNT SIX

21 U.S.C.  
§ 843(b)

That on or about the 8th day of October, 1981, JAMES C. CODDINGTON did knowingly and intentionally use a communication facility, that is, a telephone (#919-362-0216) located in the Eastern District of North Carolina, in facilitating the knowing, intentional, and unlawful conspiracy to possess with intent to manufacture and distribute a Schedule II narcotic controlled substance, to wit: cocaine, a felony under Title 21, United States Code, Section 841(a)(1), when he talked with PETER DAVID STISSER by telephone at about 6:40 p.m., in violation of Title 21, United States Code, Section 843(b).

COUNT SEVEN

21 U.S.C.  
§ 843(b)

That on or about the 2nd day of October, 1981, GARY J. FEED, a/k/a "George," did knowingly and intentionally use a communication facility, that is, a telephone (#919-362-0216) located in the Eastern District of North Carolina, in facilitating the knowing, intentional, and unlawful conspiracy to possess with intent to manufacture and distribute a Schedule II controlled substance, to wit: cocaine, a felony under Title 21, United States Code, Section 841(a)(1), when he talked to James Jacques Provost by telephone at about 3:46 p.m., in violation of Title 21, United States Code, Section 843(b).

COUNT EIGHT

21 U.S.C.  
§ 843(b)

That on or about the 12th day of October, 1981, TINA PITTS PROVOST did knowingly and intentionally use a communication facility, that is, a telephone (#919-362-0216) located in the Eastern District of North Carolina, in facilitating the knowing, intentional, and unlawful conspiracy to possess with intent to manufacture and distribute a Schedule I narcotic controlled substance, to wit: marijuana, a felony under Title 21, United States Code, Section 841(a)(1), when she talked to JAMES MAURICE JACKSON, a/k/a "Bubba," by telephone at about 3:50 p.m., in violation of Title 21, United States Code, Section 843(b).

A TRUE BILL

SAMUEL T. CURRIEN  
United States Attorney

BY: WALLACE W. DIXON  
Assistant United States Attorney

FOREMAN  
JURY  
10-12-81

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TERESA ELEAZAR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
FOR THE FOURTH CIRCUIT COURT OF APPEALS

PROOF OF SERVICE--CERTIFICATE BY BAR MEMBER

I, Christine Witcover Dean, the attorney for Teresa Eleazar, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 11<sup>th</sup> day of January, 1984, I served copies of the foregoing Petition for a Writ of Certiorari on the several parties thereto, as follows:

On the United States, by leaving a copy thereof at the office of Samuel T. Currin, Esq., United States Attorney for the Eastern District of North Carolina, Federal Building, Raleigh, North Carolina, and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

To: Samuel T. Currin, Federal Building, New Bern Avenue,  
Raleigh, North Carolina 27611

To: Rex E. Lee, Solicitor General of the United States,  
U. S. Department of Justice, Washington, D. C. 20530

Christine Witcover Dean

Christine Witcover Dean  
Attorney for Petitioner  
Post Office Box 667  
Raleigh, North Carolina 27602  
Telephone: (919) 828-9800

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TERESA ELEAZAR, PETITIONER

v

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
FOR THE FOURTH CIRCUIT COURT OF APPEALS

PROOF OF MAILING--AFFIDAVIT

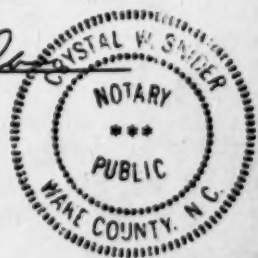
I, Christine Witcover Dean, the attorney for Teresa Eleazar, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11<sup>th</sup> day of January, 1984, I deposited in a United States post office located at Raleigh, North Carolina, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Petition for a Writ of Certiorari.

Christine Witcover Dean  
Christine Witcover Dean  
Attorney for Petitioner

Subscribed and sworn to before me, at Raleigh,  
North Carolina this 11<sup>th</sup> day of January, 1984.

Crystal W. Sailer  
Notary Public

My Commission Expires: June 21, 1988



No. **83-6092**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TERESA ELEAZAR, PETITIONER

v

UNITED STATES OF AMERICA, RESPONDENT

MOTION TO PROCEED IN FORMA PAUPERIS

Now comes the Petitioner, by and through her undersigned court-appointed attorney and moves the Court by leave to proceed on her Petition for Writ of Certiorari, attached hereto, in forma pauperis, pursuant to Rule 46, Supreme Court Rules.

Petitioner applied to both the United States District Court for the Eastern District of North Carolina and to the Fourth Circuit Court of Appeals to proceed in forma pauperis, which applications were granted. Petitioner was represented by court-appointed counsel at the trial level. That attorney withdrew, and the undersigned was appointed for the appeal under the Criminal Justice Act of 1964, as amended.

Therefore, Petitioner contends that she is indigent and qualifies to proceed in forma pauperis.

RECEIVED

JAN 13 1984

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

Respectfully submitted this 11<sup>th</sup> day of January,  
1984.

Christine Witcover Dean  
Christine Witcover Dean  
Attorney for Petitioner  
Post Office Box 667  
Raleigh, North Carolina 27602  
(919) 828-9800

MAY 7 1984

**In the Supreme Court of the United States**

ALEXANDER L. STEVAS,  
CLERK

OCTOBER TERM, 1983

GARY J. PEED and JAMES C. CODDINGTON, PETITIONERS

v.

UNITED STATES OF AMERICA

JAMES MAURICE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

JEFFREY CRAIG BUMGARDNER, PETITIONER

v.

UNITED STATES OF AMERICA

TERESA ELEAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE

*Solicitor General*

STEPHEN S. TROTT

*Assistant Attorney General*

GLORIA C. PHARES

*Attorney*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

### QUESTIONS PRESENTED

1. Whether petitioners were deprived of their right to a fair trial because of a juror's unfounded suspicions about an event outside the courthouse that were dispelled by the district judge during an ex parte inquiry.

2. Whether petitioner Jackson was tried within the time limitation imposed by the Interstate Agreement on Detainers Act, 18 U.S.C. App. § 2, Art. IV(c).

3. Whether telephone calls monitored by state police officers with the consent of a participant were properly admitted in evidence in a federal trial.

4. Whether there was sufficient evidence to support petitioner Eleazar's conviction.

5. Whether Local Rule 19 of the United States Court of Appeals for the Fourth Circuit violates due process.

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1983

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No. 83-1138

GARY J. PEED and JAMES C. CODDINGTON, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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No. 83-1155

JAMES MAURICE JACKSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 83-6086

JEFFREY CRAIG BUMGARDNER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 83-6092

TERESA ELEAZAR, PETITIONER

*v.*

UNITED STATES OF AMERICA

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***ON PETITIONS FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT***

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### OPINION BELOW

The opinion of the court of appeals (83-1138 Supp. App. 1a-18a) is reported at 717 F.2d 1481.

### JURISDICTION

The judgment of the court of appeals was entered on September 9, 1983. A petition for rehearing was denied on November 14, 1983. The petitions for a writ of certiorari were filed as follows: No. 83-1138 on January 11, 1984; No. 83-6086 on January 12, 1984; and Nos. 83-1155 and 83-6092 on January 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, all petitioners were convicted on one count of conspiring to possess cocaine with intent to manufacture and distribute, in violation of 21 U.S.C. 846 (Count 1). Except for petitioner Eleazar, each petitioner was also convicted on one of several counts of using a communication facility to facilitate the conspiracy, in violation of 21 U.S.C. 843(b) (Counts 4-7) (83-1138 Supp. App. 3a).<sup>1</sup> Petitioners Peed, Coddington, and Jackson were sentenced to four-year terms of imprisonment on each count, with the sentences on the facilitation counts suspended in favor of a five-year term of probation to run consecutively to the term of imprisonment on the conspiracy count (C.A. App. 288, 291, 292). Petitioner Bumgardner was sentenced to five years' imprisonment on the conspiracy

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<sup>1</sup> Upon petitioners' motions before trial, an additional count (Count 2) charging conspiracy to possess marijuana with intent to distribute was severed.

count, all but six months of which was suspended in favor of five years' probation; his four-year sentence of imprisonment on the facilitation count was suspended in favor of a five-year probationary term, to run concurrently with the sentence on the conspiracy count (C.A. App. 294). Petitioner Eleazar was sentenced to a five-year term of imprisonment on the conspiracy count, all but six months of which was suspended in favor of five years' probation (C.A. App. 290).<sup>2</sup>

1. Testimony presented at trial by cooperating co-conspirators showed the existence of a two-tiered drug conspiracy. The first tier was centered in Apex, North Carolina, under the supervision of James "Jacques" Provost. Jacques' two investors or partners were petitioner Peed in Virginia and petitioner Coddington in Florida. The first tier employed three drug couriers, one of whom was petitioner Jackson, who shuttled drugs and drug cutting agents between the first tier and the second, smaller tier in Jacksonville, Florida. Petitioners Bumgardner and Eleazar (who was Jackson's sister and Bumgardner's girlfriend) were part of the second tier. 83-1138 Supp. App. 3a.

The testimony of the cooperating co-conspirators was amplified by the playing of numerous recorded

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<sup>2</sup> Ronald Doyle Hines, a co-defendant whose convictions on one count each of conspiracy and using a communication facility to facilitate that conspiracy were also affirmed by the court of appeals, was sentenced to the same sentence petitioner Bumgardner received (83-1138 Supp. App. 3a; C.A. App. 289). Of the four additional people indicted with petitioners, three (Donald Christopher Provost, Darryl Stephen Provost and Peter David Stisser) pleaded guilty prior to trial, and the charges against the fourth (Tina Pitts Provost) were dismissed on the government's motion. Darryl Provost and Peter Stisser testified for the government at trial.

telephone conversations among the conspirators. In these conversations, petitioner Peed discussed the quality, quantity, and types of cocaine by the use of coded terms (12 R. 178-186)<sup>3</sup> as well as the planned delivery to him of cocaine by Darryl Provost (12 R. 75-79). In another conversation, petitioner Coddington discussed with Jacques Provost cocaine quality, delivery dates, and quantity (12 R. 159-169); the next day, after Darryl Provost had been arrested with cocaine in Virginia, they discussed the arrest, the sale of land to raise funds for cocaine, and the amount of money needed to pay for the cocaine confiscated in Virginia (13 R. 81-92). Petitioner Jackson was recorded requesting Darryl Provost to bring him tools for treating cocaine (12 R. 104-105) and discussing the pickup of proceeds from cocaine sales (14 R. 147-148, 171-174, 188-194).

The participation of petitioners Bumgardner and Eleazar in the drug scheme was similarly evidenced by their recorded conversations. In a conversation with Jackson, petitioner Bumgardner discussed drug transactions using coded terms (14 R. 245-249). Later, after discussing "the weights and everything" (*ibid.*), Jackson determined from Bumgardner that certain scales were "triple beam" and told Bumgardner to "take that thing and make four of them out of it" (15 R. 10-11). The next day Jackson asked Bumgardner whether or not "they look like they're weighed out right," and Bumgardner indicated that he did only "2 G's at a time" (15 R. 74-75).

Petitioner Eleazar's boyfriend (Bumgardner) and brother (Jackson) used her telephone to carry out drug transactions (11 R. 137-138). During at least one conversation, she listened on an extension phone

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<sup>3</sup> "R." refers to the record on appeal.

and twice interjected comments in the conversation (15 R. 108-109). During one call, she told Jackson that "Ronnie got all that stuff" (14 R. 91), and later in the same call Bumgardner told Jackson that "Teresa [Eleazar] went by and picked it up" (14 R. 92-93). During another call, petitioner Jackson directed co-defendant Hines to give money to Bumgardner, "because I'm gonna get them to wire me the money" (15 R. 80, 81). Three days later, Jackson instructed his sister how to wire money to Jacques Provost in North Carolina and told her "if you got to leave a name, just give some, you know, anonymous name, you know" (15 R. 102).

2. After the verdicts were returned, petitioners learned that during trial one of the jurors had become concerned by a courthouse incident and had reported the matter to the district judge, who, after investigation, had reported back to the juror (83-1138 Pet. App. 13a-16a). At the request of counsel (*id.* at 11a), the district court conducted a hearing on September 30, 1982, attended by all petitioners (except Bumgardner, who had been arrested on other charges the night before) and their counsel (9/30/82 Tr. 5). The testimony at that hearing showed that, during trial, an FBI agent investigating another matter attempted to photograph some of the defense witnesses as they left the courthouse at the end of the day (83-1138 Supp. App. 17a; 83-1138 Pet. App. 20a, 25a-26a). To focus his camera, he aimed it at several people, including some jurors, as they left the courthouse (83-1138 Pet. App. 26a).

One of the jurors, Bryant Deaton,<sup>4</sup> observed the photography, noted the license number of the pho-

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<sup>4</sup> Juror Deaton's name was misspelled "Denton" by the court of appeals (83-1138 Supp. App. 17a).

tographer's car, and returned to the courthouse to report the incident (83-1138 Pet. App. 19a-20a, 30a). The judge called Deaton into chambers, where Deaton reported the incident in the presence of the judge's clerk and gave the judge the piece of paper with the license plate number (*id.* at 20a, 30a-31a, 35a). After the juror's departure, the district judge called the FBI, described the events, and gave the agents the license number provided by Deaton (*id.* at 20a, 24a-25a). The investigating agent determined that another agent was responsible for the photography and reported that fact to the district judge early the following morning (*id.* at 25a-26a).

When juror Deaton arrived in the jury room the following morning, he expressed his concern about the incident to the foreman (9/30/82 Tr. 105). The district judge then called Deaton to his chambers to notify him of the result of his investigation. The district judge told Deaton that he had determined who had been taking the photographs; that the photography had not been aimed at the jurors and that Deaton should not consider it to have been directed at him or at any other juror; and that the judge would prefer not to describe the background of the incident in detail at that time but would do so at the end of trial (83-1138 Pet. App. 20a, 31a). When juror Deaton returned to the jury room, he recounted the incident to the other jurors and reported that the judge "had assured [him] that everything was okay" (*id.* at 32a, 36a). The incident was not discussed or mentioned again among the jurors during trial or deliberations (*id.* at 32a, 34a, 36a).

Juror Deaton testified that when he initially saw the photographer he was apprehensive, thinking that someone might be photographing the jurors in order to retaliate if they returned a guilty verdict (83-1138

Pet. App. 36a, 40a). After talking to the district judge the following morning, however, "[i]t was no longer a concern for me \* \* \*. I didn't think any more about it" (*id.* at 34a). Juror Deaton affirmed that the incident did not have "any effect whatsoever on [his] verdict" (*ibid.*). Nor, in his opinion, did the incident have any impact on the deliberations of the jury (*id.* at 32a-33a). As Deaton explained, he assumed "after the judge had said that everything was okay that it was something to do with either the SBI or the FBI or some law enforcement agency" (*id.* at 42a). It was to satisfy his curiosity about the incident and the accuracy of his assumption that he asked the judge from the jury box for more details about the photography incident after the jury had rendered its verdict (*id.* at 13a, 34a).

At the conclusion of the hearing, the district court issued written findings and concluded that the deliberations of neither juror Deaton nor other members of the jury had been prejudiced as a result of the incident (C.A. App. 297-299).

3. On appeal, petitioners raised many of the same issues presented here. The court of appeals rejected their challenges and affirmed the convictions. In particular, it held that (1) the federal wiretap evidence was not tainted by allegedly illegal consensual monitoring of phone calls by state police officers (83-1138 Supp. App. 4a-6a); (2) petitioner Jackson, after excluding the time consumed by resolution of his pre-trial motions and his request for continuances, was tried within the 120-day limit of the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. App. § 2, Art. IV (83-1138 Supp. App. 8a-9a); (3) there was a preponderance of evidence independent of the co-conspirator statements to show that petitioners Bumgardner and Eleazar were members of the con-

spiracy (*id.* at 11a-12a); (4) the evidence of petitioner Eleazar's participation in the conspiracy was sufficient to support her conviction (*id.* at 16a-17a); and (5) petitioners had received the hearing to which they were entitled regarding the possible prejudicial impact of the photography incident, and the district court's finding that the episode had not prejudiced petitioners was not clearly erroneous (*id.* at 17a-18a).

### ARGUMENT

1. All petitioners except Jackson contend (83-1138 Pet. 8-29; 83-6086 Pet. 5-8; 83-6092 Pet. 16-22) that the photography incident deprived them of their right to an impartial jury. They also argue that the district judge's ex parte contact with juror Deaton deprived them of various constitutional and statutory rights, and that the district court's post-trial hearing inadequately resolved those claims.<sup>6</sup> We submit that, regardless of petitioners' claims of constitutional injury, they have failed altogether to show any harm flowing from the incident. *Rushen v. Spain*, No. 82-2083 (Dec. 12, 1983).<sup>6</sup>

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<sup>6</sup> We note that, in the court of appeals, petitioners assessed the merits of this issue to be so low as to accord it less than one page in their brief (C.A. Br. 71-72). That bare statement of the claim was amplified in their reply brief (C.A. Reply Br. 18-28), to which the government, of course, had no opportunity to respond.

<sup>6</sup> The essence of petitioners' various constitutional claims is that they had a due process right to a mid-trial hearing regarding the trial court's contact with juror Deaton. There was, however, a post-trial hearing on the issue that was attended by all petitioners (except Bumgardner, who had been arrested the night before) and their counsel, and all counsel participated in the cross-examination of the witnesses. Even if it would have been preferable for the court to notify counsel

a. Petitioners have failed, as the district court concluded (C.A. App. 299), to carry their initial burden of showing a deprivation of a right so essential to the integrity of the trial that it renders void their presumptively valid convictions. Petitioners were unable to show that juror Deaton's experience interfered, directly or indirectly, with the jury's deliberations.<sup>7</sup> Deaton's overnight suspicion of foul

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promptly of his exchange with Deaton—when, for example, alternate jurors could have been used if he were found to be prejudiced—the omission is not fundamental here, where Deaton was found not to be prejudiced. Indeed, because petitioners do not claim any prejudice from the judge's ex parte contacts themselves, but only from the juror's misapprehension about the photography incident, it is difficult to see why the post-trial hearing was not an adequate forum to inquire into the incident. See *Rushen v. Spain*, slip op. 5 n.5 (Stevens, J., concurring).

The complaint of petitioners Peed and Coddington (83-1138 Pet. 23-24) that they were not given prior notice that the September 30 sentencing hearing would also be a hearing into the photography incident is unavailing. They argue that, because of the lack of notice, they were unable to prepare for the hearing by collecting factual information. The simple answer to this contention is that, had the judge convened a mid-trial hearing as petitioners seem to prefer, they would have had no greater opportunity to prepare.

<sup>7</sup> The district court's factual findings regarding its ex parte communications with Deaton and their effect on juror impartiality are entitled to a presumption of correctness. See *Rushen v. Spain*, slip op. 6. Cf. *Rogers v. United States*, 422 U.S. 35, 40-41 (1975) (Court concludes that ex parte contact by judge with deliberating jurors is not harmless error because of "the nature of the information conveyed to the jury" and the "manner in which it was conveyed"; error was compounded by the fact that the trial court did not hold any hearing into the effect of its communication with the jurors and "petitioner's counsel was not aware of the court's communication until after \* \* \* the petition for certiorari" was granted).

play was based on his erroneous inference from FBI conduct wholly unrelated to him. As Deaton testified, and as the district court found (C.A. App. 298-299), the court's assurance that the photography had nothing to do with him or anyone else on the jury completely alleviated Deaton's concern and the incident had no effect on his deliberations or decision as a juror. Like the juror in *Spain*, Deaton "turned to the most natural source of information—the trial judge"—to report his observations (*Rushen v. Spain*, slip op. 7). And, as in *Spain*, the district judge "did not discuss [with the juror] any fact in controversy or any law applicable to the case" (*ibid.*). The conclusion that Deaton was not biased by the photograph incident or his contact with the judge is amply supported by the record.\*

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\* Petitioner Eleazar argues (83-6092 Pet. 21) that the trial court's failure to give juror Deaton a complete explanation of the FBI's activities inevitably contributed to bias and that this Court disapproved of such a partial communication in *Remmer v. United States*, 350 U.S. 377, 379 (1956). This argument overlooks a critical difference in the facts of the two cases. In *Remmer*, the juror had been approached by a third party who suggested he make a deal with the defendant. Thereafter, the juror approached the trial court, who contacted the FBI, who in turn interviewed the juror (350 U.S. at 380-381). The juror, however, was never informed of the outcome of the FBI investigation (*id.* at 382). This Court remanded the case for a new trial because this course of events left the juror "a disturbed and troubled man \* \* \* subjected to extraneous influences to which no juror should be subjected" (*id.* at 381-382). The facts of this case hardly parallel *Remmer*. Whatever Deaton initially feared, he knew he had no role in and could not be suspected of any wrongdoing. And once he was assured that the incident did not concern him or the other jurors in any way, the possibility of bias was removed.

Nor did petitioners sustain their burden of showing that the other jurors were prejudiced or influenced by the incident. If any of the other jurors saw the original photography, none of them brought it to the attention of the judge. Juror Deaton returned alone to the courthouse to report his concerns. The next morning, before talking to the district judge, Deaton discussed the matter only with the jury foreman (9/30/82 Tr. 105). Not until he returned from the judge's chambers did he tell the other jurors about the incident, and at that point he also conveyed the judge's assurance that it did not concern any of them in any way (83-1138 Pet. App. 32a, 34a, 36a). Thus, none of the other jurors experienced any period of doubt before the matter was resolved.

b. Petitioners contend (83-1138 Pet. 22-29; 83-6086 Pet. 7-8; 83-6092 Pet. 16-22) that the post-trial hearing into the photography incident was defective and did not comport with the requirements of *Remmer v. United States*, 347 U.S. 227, 230 (1954). In particular, they argue that the district court erroneously imposed the burden of proof on them rather than on the government and that the district judge's failure to call all the other jurors deprived petitioners of the opportunity to test the impartiality of the whole jury.<sup>9</sup>

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<sup>9</sup> Petitioners also assert (83-1138 Pet. 24-25) that the need for the district judge to relate the circumstances of the ex parte contact required him to recuse himself, because only in that way could he be properly cross-examined. But, while a judge does not properly act as a witness in a trial at which he presides, that principle does not bar him from relating the historical facts surrounding his mid-trial communication with a juror. Because there "is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something" (*Rushen v. Spain*, slip op. 4), forbid-

i. Petitioners' argument that they were required improperly to bear the burden of proof misapprehends *Spain, Remmer*, and *Smith v. Phillips*, 455 U.S. 209 (1982). A defendant claiming juror impartiality is entitled to a hearing in which he "has the opportunity to prove actual bias." *Phillips*, 455 U.S. at 215; *Rushen v. Spain*, slip op. 5 n.3. Some circumstances, however, justify a presumption of bias or prejudice.<sup>10</sup> But the burden shifts to the government to show beyond a reasonable doubt that the error was harmless only after the defendant has established actual or presumptive prejudice. *Remmer*, 347 U.S. at 229.

The facts in this case do not meet the standards for presumptive prejudice as defined by this Court, nor have petitioners shown actual prejudice. This case does not resemble *Remmer's* attempted bribery of a juror by a third party. Indeed, it involves no third-party contact at all. Just as importantly, the photography incident did not involve a matter pending before the jury. And, no extraneous outside pressures were brought to bear on Deaton or other mem-

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ding a judge to relate these details unless he is called as a witness before another jurist would ignore the "day-to-day realities of courtroom life" (*ibid.*). In any event, every fact related by the judge in this case was corroborated by the FBI agent and juror Deaton, both of whom were extensively cross-examined. Moreover, none of the trial attorneys showed the least reluctance to speak candidly to the judge about his actions (9/30/82 Tr. 174).

<sup>10</sup> In *Remmer*, where a third party had suggested to a juror that he could profit financially by making a deal with the defendant, the court held that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is \* \* \* presumptively prejudicial" (347 U.S. at 229).

bers of the jury.<sup>11</sup> Because the facts of this case cannot be considered to raise a presumption of bias on the part of Deaton or other members of the jury, petitioners bore the burden of making an initial showing of actual prejudice; as demonstrated above, they failed to shoulder it.

ii. At the conclusion of the examination of the witnesses at the post-trial hearing, defense counsel requested the district judge to call the other jurors to ascertain the impact of the incident on them (9/30/82 Tr. 169-170). Contrary to petitioners' contention, the district court did not deny their request outright. He instead reserved the decision whether to call additional witnesses until after argument from counsel (*id.* at 171). The thrust of counsel's argument to the district court was that a post-trial hearing skews the resolution of the prejudice issue (*id.* at 174), that the government had engineered the photography incident (*id.* at 176, 179, 182, 184), that the whole affair was highly prejudicial and unfair (*id.* at 175, 177, 179-180, 185-186), and that the government had failed to carry its burden (*id.* at 173, 175). Only the lawyer of the one petitioner who does not present the question to this Court (see 83-1155 Pet. at i) suggested the need to call the other jurors, and even his asserted need for those witnesses was diminished by his claim that, at the outset, prejudice is presumed in a case like this (9/30/82 Tr. 174-175). No other counsel at the hearing

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<sup>11</sup> The only "outside influence" on Deaton was created by the juror himself when he misinterpreted the photography incident. The issue at the post-trial hearing was not whether Deaton had been biased by the photography, but whether he harbored any ill will toward petitioners after he received the judge's assurance that the incident had nothing to do with him or the jury.

or following issuance of the court's final order pressed the need to examine the other 13 jurors. The district court's ruling on this issue, therefore, warrants no further attention by this Court.

In any event, the district court explained its decision not to call additional witnesses. It found Deaton to be a highly credible witness. Referring to Deaton's assertion that the incident was not discussed during the trial or the jury's deliberations, the court found it "inconceivable \* \* \* that any of the other jurors, not directly involved in the incident, could have been prejudiced or influenced in any way" (C.A. App. 299). In these circumstances, the trial court acted well within its discretion in refusing further probing of the jury.

2. Petitioner Jackson contends (83-1155 Pet. 10-23) that the court of appeals erred in concluding that he waived the 120-day limitation of the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. App. § 2, Art. IV(c), when he requested that he be treated in a manner inconsistent with that time limitation by seeking continuances and joining with the other petitioners in several pretrial motions. He cites no authority to the contrary, however, and his position is not supported by reason or the legislative history of the Act.

The government brought petitioner to North Carolina for trial from Florida, where he was in custody, by detainer. He arrived in North Carolina on April 13, 1982, and trial commenced 133 days later, on August 24, 1982. On April 26, 1982, petitioner moved the district court to allow him to adopt the motions of his co-defendants, the hearings on which consumed 16 days (83-1138 Supp. App. 8a). In addition, peti-

tioner requested singly, or joined in the motions of co-defendants for, continuances which consumed another 50 days (*id.* at 9a). In this Court, as below, petitioner contests the assertion that he sought these continuances (83-1155 Pet. 14). But, as the court of appeals noted, exclusion of the 16-day period required to resolve the pre-trial motions would by itself bring petitioner's trial well within the 120-day limitation period (83-1138 Supp. App. 9a).<sup>12</sup>

Petitioner argues (83-1155 Pet. 19-21) that the court of appeals' analogy to the Speedy Trial Act of 1974, 18 U.S.C. 3161(h), is inconsistent with congressional intent. This claim is, however, refuted by the legislative history of the IAD. The IAD was a legislative response to the Court's ruling in *Dickey v. Florida*, 398 U.S. 30 (1970), which held that a state must make a diligent, good faith effort to try a defendant within a reasonable time even when he is serving a sentence in a federal prison outside the state. The

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<sup>12</sup> On facts closely analogous to those of the present case, the Second Circuit recently rejected a claim under the IAD identical to the one presented by petitioner in this Court. *United States v. Scheer*, No. 83-1308 (2d Cir. Feb. 24, 1984). In that case, the court of appeals noted that "[t]he defendant asked for additional time to procure an attorney, to suppress evidence and to procure a state transcript. He requested continuances based on the unavailability of his witnesses and moved that the court allow these witnesses to be subpoenaed" (slip op. 2001). Finding that "it is appropriate to exclude all those periods of delay occasioned by the defendant" (slip op. 2000) which in that case amounted to 148 days, the court of appeals concluded that the defendant's rights under the IAD were not violated (*id.* at 2001-2002) (citing cases). Although the defendant had awaited trial a total of 249 days, after deducting the 148 days of delay "that defendant requested \* \* \* solely for his benefit," the court found that he was "brought to trial within the statutory [120-day] time period" (slip op. 2000).

IAD was enacted principally to "afford defendants in criminal cases the right to a speedy trial and diminish the possibility of convictions being vacated or reversed because of a denial of this right." S. Rep. 91-1356, 91st Cong., 2d Sess. 2 (1970). Because the IAD and the Speedy Trial Act of 1974 are both intended to insure speedy trials, they should not be interpreted in a discordant manner. *United States v. Odom*, 674 F.2d 228, 231 (4th Cir.), cert. denied, 457 U.S. 1125 (1982). See also *United States v. Stewart*, 311 U.S. 60, 64-65 (1940) (statutes having same purpose should be construed together). The court of appeals, therefore, properly concluded that any period lawfully excluded under 18 U.S.C. 3161(h) will generally qualify for exclusion under the "good cause" provision of IAD § 2, Art. IV(c) (83-1138 Supp. App. 8a; *Odom*, 674 F.2d at 231).

Petitioner's further argument that the time provisions of the IAD must be explicitly waived in open court<sup>13</sup> and cannot be waived by his own actions is not supported by the cases on which he relies<sup>14</sup> and

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<sup>13</sup> Petitioner's suggestion (83-1155 Pet. 17) that any waiver here does not comply with the "in open court" provision of the IAD because his motions for continuances and other relief were written is an overly literal interpretation of the Act. The language in the IAD relied upon by petitioner was meant to prohibit ex parte and sua sponte continuances; it was not designed to require the personal presence of the parties to discuss the excludability of time. *Odom*, 674 F.2d at 231.

<sup>14</sup> Petitioner's reliance on *United States v. Mauro*, 436 U.S. 340 (1978), is misplaced. In a companion case to *Mauro*, this Court dismissed charges that were not tried within the 120-day limitation of the IAD, but the defendant in that case, unlike petitioner, had made repeated requests for a speedy trial, had taken no action that would delay trial, and had objected to other efforts to continue or delay trial. 436 U.S. at 346-347, 364-365.

is contrary to common sense. Without citing any authority, petitioner claims (83-1155 Pet. 17-19) that his own acts that are inconsistent with the IAD protection of his speedy trial rights cannot be construed as an implicit waiver of the IAD time limitation. But petitioner's argument, taken to its logical conclusion, would give a defendant the power to delay his trial past the 120-day limitation period with pre-trial motions and requests for continuances, and then demand dismissal of all charges because of that delay. Such a result is clearly inconsistent with the legislative objective of "diminish[ing] the possibility of convictions being vacated or reversed because of a denial of [a speedy trial]." S. Rep. 91-1356, *supra*, at 2. If petitioner objected to the delay of his trial, he should, like the defendant in *United States v. Mauro*, 436 U.S. 340 (1978), have interposed an explicit objection on speedy trial grounds so that the trial court could consider it. *Odum*, 674 F.2d at 231-232.

3. Petitioner Eleazar contends (83-6092 Pet. 14-15) that evidence seized in the federal wiretap should have been excluded because that wiretap was instituted on the basis of information gained from the improper monitoring of telephone calls by state officers. Petitioner's argument founders, however, on both state and federal law.

First, as the court of appeals noted, while a municipal police officer in Florida has limited authority to conduct an investigation outside city limits (*Wilson v. Florida*, 403 So.2d 982, 984 (Fla. 1980)), such an investigation is within the officer's authority if the crime under investigation took place within the city limits (83-1138 Supp. App. 5a). In this case, Jacksonville Beach police officers monitored calls made by their informant to Jacques Provost's home

outside city limits. However, because the officers were investigating a double murder that occurred in Jacksonville Beach, which Jacques Provost was suspected of having ordered, the consensual monitoring of the telephone calls was legal under state law (83-1138 Supp. App. 5a).

Second, whether evidence is admissible in a federal court is a question of federal law. See, e.g., *Elkins v. United States*, 364 U.S. 206, 223-224 (1960); *United States v. Zemek*, 634 F.2d 1159, 1164 n.4 (9th Cir. 1980), cert. denied, 450 U.S. 985 (1981); Fed. R. Evid. 402. Federal law clearly permits the admission of consensual wiretap evidence irrespective of whether it conforms to state wiretap standards. See, e.g., *United States v. Adams*, 694 F.2d 200, 201 (9th Cir. 1982), cert. denied, No. 82-1427 (June 13, 1983); *United States v. Neville*, 516 F.2d 1302, 1309 (8th Cir. 1975). Because the monitoring of the telephone calls at issue would have been legal under federal law (18 U.S.C. 2511(2)(c)), admission of the wiretap evidence in a federal trial was wholly uncontroversial.

4. Petitioner Eleazar also argues (83-6092 Pet. 15-16) that the evidence supporting her conviction was insufficient.<sup>15</sup> Both courts below have rejected this fact-bound claim and the question does not warrant further consideration by this Court. See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2

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<sup>15</sup> Petitioner also asserts (83-6092 Pet. 12-13) that there was insufficient evidence independent of her co-conspirators' statements showing the existence of the conspiracy and her participation in it. This fact-bound contention is without merit. There was ample independent evidence showing petitioner Eleazar's participation in the conspiracy—largely derived from recordings of petitioner herself. See n.16, *infra*.

(1975); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967).<sup>16</sup>

5. Finally, petitioners Bumgardner and Eleazar complain that the court of appeals' Local Rule 19, which requires the filing of one brief for each side in a consolidated case, violates due process (83-6086 Pet. 4; 83-6092 Pet. 9).<sup>17</sup> We have substantial reservations about the wisdom of this rule, but it does not

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<sup>16</sup> In any event, the record in this case amply supports petitioner Eleazar's conviction. See 83-1138 Supp. App. 16a-17a. For example, in one telephone call petitioner told Bubba Jackson that "Ronnie got all that stuff" (*id.* at 12a, 16a). Later in the same call, Bumgardner informed Jackson that "Teresa [petitioner] went by and picked it up," where "it" referred to cocaine (*ibid.*). During another call, Jackson told Hines to give money from a drug sale to Bumgardner because Bumgardner and petitioner would be wiring money to him. Three days later, Jackson instructed petitioner how to wire money under an assumed name. Although petitioner testified at trial and offered her own version of these events, the jury apparently did not accept her story (*id.* at 17a).

<sup>17</sup> Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit provides:

Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the Clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the Clerk shall designate lead counsel. The individuals so designated shall be responsible for the coordination, preparation and filing of the brief and appendix.

follow that it is unconstitutional or that its application in this case merits review by this Court.

The courts of appeals are authorized to regulate their practice "in any manner not inconsistent with [the Federal Rules of Appellate Procedure]" (Fed. R. App. P. 47), and the court of appeals' rule is not inconsistent with any provision of the rules.<sup>18</sup> The rule is not calculated to preclude the presentation of issues or arguments by individual appellants, but rather to encourage such litigants to keep their appellate pleadings within manageable limits. The record in this case, moreover, demonstrates that the rule did not in fact preclude the petitioners from presenting their various arguments before the court of appeals.

Following entry of the lower court's order consolidating the appeals in this case, all counsel for the various petitioners joined in a motion to enlarge the length of the brief from 50 to 75 pages. That motion was granted by the court. Counsel apparently encountered some difficulty in compiling the consolidated brief, however, and two briefs were in fact submitted to the court of appeals, a 72-page brief and a 128-page brief. The latter, according to counsel, "consist[ed] of the good faith presentation of issues by officers of this court as if they were representing their clients without the inhibitions of \* \* \* Local Rule 19" (Second Motion to Enlarge Length of Brief at 4). The court was not informed at this time that the shorter brief omitted any important arguments

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<sup>18</sup> Rule 28(i) of the Federal Rules of Appellate Procedure provides that, in cases involving multiple appellants or appellees, "any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs."

on behalf of individual petitioners, and the motion to file the 128-page brief was denied.

Thereafter, several reconsideration motions were filed with the court of appeals. These motions, for the first time, suggested that the 72-page brief did not contain certain arguments various petitioners desired to present to the appellate court. See Appellant Gary J. Peed's Motion for Reconsideration at 3-4; Appellant Jeffrey Craig Bumgardner's Motion for Reconsideration at 3-4; Appellant James C. Coddington's Motion for Reconsideration at 3-4. Apart from citing the general "difficulty of filing a joint brief with six parties' interests being represented,"<sup>19</sup> however, the motions gave no reasons why the court should further extend its 75-page limitation on the consolidated brief. In particular, although the various motions alleged that counsel for petitioners were "unaware" that certain arguments had been deleted from the shortened brief (Reconsideration Motions for Peed, Bumgardner and Coddington at 4), the papers filed with the court did not explain why counsel were not cognizant of the contents of a brief supposedly prepared under their direction. Moreover, the various motions did not explain why petitioners did not utilize the three remaining pages of briefing left to them under the court's prior order to bring at least some of the "omitted" issues to the court's attention. Accordingly, the court denied the reconsideration motions.

Thus, the course of events in this case does not show that the operation of Local Rule 19 denied petitioners any due process right to present their arguments. Petitioners never availed themselves of their

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<sup>19</sup> Motion for Reconsideration at 3 filed by lead counsel for the appellants.

right under Rule 19 to seek permission to file separate briefs upon a showing of "good cause," nor did they explain in timely fashion what specific prejudice would be incurred by filing within the 75-page limit sought and granted in their initial motion. Rather, petitioners simply refused to present their omitted arguments to the court of appeals on any but their own terms. In these circumstances, their complaint regarding the local rule does not merit review by this Court.

### CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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